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THE AUSTINIAN  
THEORY OF LAW



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# THE AUSTINIAN THEORY OF LAW

BEING AN EDITION OF LECTURES I, V, AND VI  
OF AUSTIN'S "JURISPRUDENCE," AND OF AUSTIN'S  
"ESSAY ON THE USES OF THE STUDY OF  
JURISPRUDENCE" WITH CRITICAL NOTES AND  
EXCURSUS

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LONDON

JOHN MURRAY, ALBEMARLE STREET

1906



"John Austin était un des hommes les plus distingués, un des esprits les plus rares, et un des cœurs les plus nobles que j'ai connus."  
GUIZOT.

"Though the merit and work of Austin's writings as a contribution to the philosophy of Jurisprudence are conspicuous, their educational value as a training school for the higher class of intellects will be found, we think, to be still greater. Considered in that aspect there is not extant any other book which can do for the thinker exactly what this does. . . . As a mere organon for certain faculties of the intellect, a practical logic for some of the higher departments of thought, these volumes have a claim to a place in the education of statesmen, publicists, and students of the human mind."

JOHN STUART MILL.

"To Bentham, and even in a higher degree to Austin, the world is indebted for the only existing attempt to construct a system of jurisprudence by strict scientific process, and to found it, not on a *a priori* assumption, but on the observation, comparison, and analysis of the various legal conceptions. There is not the smallest necessity for accepting all the conclusions of these great writers with implicit deference, but there is the strongest necessity for knowing what those conclusions are. They are indispensable, if for no other object, for the purpose of clearing the head."—SIR HENRY MAINE.

"I seem still to see his (Austin's) erect figure, his white hair, and his large dark eyes, as, in his musical, rich voice, he told me it was most important to think distinctly, and to speak my thoughts with meaning."—JANET ROSS.



## PREFACE

I WISH to acknowledge my indebtedness to the Editors of the "Law Quarterly Review," the "Columbia Law Review," and the "Juridical Review" for permission to make use of certain articles which have previously appeared in one or other of the Reviews mentioned. I have also to acknowledge my great indebtedness to Dr. J. M. Gover for consenting, at a time of stress, to undertake the work of revising the proofs.

W. J. B.



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N.B.—In the larger edition of Austin's "Jurisprudence," Chapters I and II above appear as Lectures I and V respectively, Chapters III–VI appear as Lecture VI, and Chapter VII appears as an Essay.



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## INTRODUCTION

THE chief object of the present work is to present, for the use of students of legal science, a statement and a critical interpretation of the theory of sovereignty and law which has been traditionally associated with the name of John Austin. In several respects I endeavour to defend that theory against the attacks of more recent writers; where I feel impelled to differ from Austin, I venture to suggest the lines along which a reconstruction of his doctrine appears to me possible.

### THE STATEMENT OF AUSTINIAN DOCTRINE

The statement of the Austinian doctrine is taken from the text of the fifth edition of Austin's "Jurisprudence," which was edited by Mr. Robert Campbell in 1885. But I have made use of no more than a small fragment of this original; and with the text of that fragment I have taken many liberties. My action in both respects calls for a word of explanation and apology.

The number of students who wish to cover the whole ground of Austin's work, even in the abbreviated edition known as "The Student's Austin," has naturally diminished with the publication of more recent manuals. Yet, so stimulating is Austin as an author, so rare is his power of analysis, and so far-reaching has been his influence upon later thought, that no student of legal science in the Anglo-Saxon world, who is in earnest about his subject, can afford to remain wholly unacquainted with the Austinian text.

The present work includes just so much of that text as appears to me indispensable. The task of selection has not been difficult. The most characteristic and valuable part of Austin's work is undoubtedly to be found in the earlier lectures which were published in his lifetime under the title of "The Province of Jurisprudence Determined." Lectures I, V, and VI of that part, in an abbreviated form, almost constitute the present text. "We feel certain," wrote John Stuart Mill, in speaking of Lectures V and VI, "that any competent student of the subject who reads those lectures once will read them repeatedly, and that each reading will raise higher his estimate of their substance."

The liberties taken with Austin's text will be excused by all who have any acquaintance with the original. Although Austin's style has been subjected at times to an exaggerated censure, no one can doubt that he repeated himself beyond all reasonable limits, or that his employment of the superlative of invective at times bordered on the truculent. In preparing this edition, I have not hesitated to delete a word, a phrase, or even a paragraph, where no real sacrifice of meaning was involved. The text has been thereby reduced by at least one-third. In the great majority of the occasions on which Austin employed italics, I have ventured to substitute ordinary type. Substantially, such changes are no more than a necessary consequence of the endeavour to adapt oral lectures for publication in book form. It is greatly to be regretted that Austin, or a courageous secretary under his direction, did not make them in the course of preparing the first edition.

#### AN INTERPRETATION AND A CRITICISM

The need for an interpretation of Austin may be disputed by those students who, imagining censure to be criticism, are more eager to abuse Austin than to understand him. But

the need will be admitted without hesitation by all who, as teachers or examiners in Jurisprudence at our Universities, have been in a position to realize with what facility the student may swallow both Austinian dogma and later criticism without understanding either. With the object of helping the student to a more profitable employment of his time, I have added to Austin's text a series of Questions and Notes.

The inclusion of Questions may raise, in the minds of some, false hopes of a *vade mecum* for examination purposes. My real aims have been very different, and find their justification in the belief that our receptive faculties to-day grow at the expense of the original or initiative. The bulk and accessibility of modern literature threaten to become a snare to the unwary student, who is led away from the practice of thinking for himself. To have his thinking done for him by another is so easy and so inviting, and the temptation waylays him at every turn. Books there are of all kinds, and at all prices, wherein he may find knowledge codified, and little left for him to do but passively accept the conclusions which others have won. Surrounded by temptation, pressed too by the prospective struggle for livelihood, the student is very apt to yield himself to a soul-destroying despotism. He becomes a mere receptacle for the views of others. Such a fate were a calamity for any student, but must seem peculiarly abhorrent when it befalls one who has undergone the discipline of an Academy. In truth, it is relatively unimportant how much a student knows when he leaves the University. It is of incalculable importance that he should have schooled himself in right methods of thinking, that he should have learnt to give a reason for the faith that is in him, that he should have won his way to freedom of thought. "Students," as a great thinker has warned us, "should be *told* as little as possible,

and induced to *discover* as much as possible." The Questions in the present work are designed to assist the student in the work of achieving for himself an independent interpretation and criticism of Austin. They assume that the student has read so much of Austin's text as is included in the present volume; and that he is endeavouring on a second reading of that text to deal with it in a more reflective and critical manner. He will, of course, give his own answer before seeking for hints in the Notes. Some of the Questions he will find very elementary. Others may seem difficult. If he can answer all of them to his satisfaction, he is more fortunate than the present author. For I have never refrained from asking a Question because I have thought it might be unsatisfactorily answered, if in point of fact it seemed calculated to set the student a-thinking.

If the Questions achieve the objects just suggested, the student may find my Notes superfluous. Though I shall be well content if this prove to be the case, I do not allow myself to entertain extravagant hopes in this direction. In the presence of the prevailing fetishism of more information, weighable out for examination purposes by the pound avoirdupois, the student is too prone to act upon the assumption that he who stops to think is lost. But even if the student can rise above the temptation to sacrifice the discipline and spirit of true culture to quantitative conceptions of knowledge, he may not always have the imagination to see the real difficulties in a text, or to appreciate those difficulties when formally stated in the interrogative form. Austin's work, particularly, calls for some guidance in these respects. It is apt to create in the student's mind a quite illusory sense of comprehension and mastery. The first object of the Notes has been to draw attention to the meaning and difficulties of the text; the second, to make some suggestions towards a serviceable criticism of it. I venture to hope that a student

of the present work, in addition to understanding Austin better, will have made some not insignificant progress in that art of roading in which our time is sadly deficient.

The programme just sketched may tell for intellectual unrest. But intellectual unrest is preferable to unreasoning acquiescence. Moreover, I do not for a moment design this work as a substitute for tuition. On the contrary, I rather hope that the student will gain a clearer perception of the high purposes which tuition may serve.

## A RECONSTRUCTION

What is the most serious criticism that can be urged against Austin's theory of sovereignty and law? Not, I think, its positive errors; but its inadequacy. Austin possessed extraordinary powers of analysis, but his analysis was apt to stop short at a point where the requirements of logical definition seemed to be satisfied. He clearly distinguished between Positive Law and Morality, yet his definition of the former omits elements which must be deemed essential. So in distinguishing the sovereign from the subject he made no attempt to view these as parts of that larger whole without which they cannot be adequately understood. In so far as such deficiencies prejudiced Austin's discussion of particular problems, I have endeavoured to deal with them in the Notes. In the Excursus, I have given a more complete and formal exposition of certain topics which seemed to call for fuller discussion. Two of the Excursus, I ought to add, deal with Judiciary and Customary Law, and are essentially an endeavour to justify conclusions which Austin adopted, but later critics have called in question.



# PART I

## CHAPTER I

### THE DEFINITION OF A LAW

1. **THE** matter of jurisprudence is positive law: law, simply <sup>The</sup> and strictly so called: or law set by political superiors to <sup>matter of</sup> political inferiors. But positive law (or law, simply and <sup>jurispru-</sup> strictly so called) is often confounded with objects to which it is related by resemblance, and with objects to which it is related in the way of analogy: with objects which are also signified, properly and improperly, by the large and vague expression law.

2. A law, in the most general and comprehensive accepta- <sup>Law: in</sup> tion in which the term, in its literal meaning, is employed, <sup>most com-</sup> may be said to be a rule laid down for the guidance of <sup>prehensive</sup> an intelligent being by an intelligent being having power <sup>literal</sup> over him. In this the largest meaning which it has, without extension by metaphor or analogy, the term law embraces the following objects:—Laws set by God to his human creatures, and laws set by men to men.

3. The whole or a portion of the laws set by God to men <sup>Law of</sup> is frequently styled the law of nature, or natural law: being, <sup>God.</sup> in truth, the only natural law of which it is possible to speak without a metaphor, or without a blending of objects which ought to be distinguished. But, rejecting the appellation



Law of Nature as ambiguous and misleading, I name those laws or rules, as considered collectively or in a mass, the *Divine law*, or the *law of God*.

Human  
laws,  
Two  
classes,  
1st class.  
Laws set  
by political  
superiors.

4. Laws set by men to men are of two leading or principal classes. Some are established by *political* superiors, sovereign and subject: by persons exercising supreme and subordinate government, in independent nations, or independent political societies. The aggregate of the rules thus established, or some aggregate forming a portion of that aggregate, is the appropriate matter of jurisprudence, general or particular. To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term law, as used simply and strictly, is exclusively applied. But, as contradistinguished to natural law, or to the law of nature (meaning, by those expressions, the law of God), the aggregate of the rules, established by political superiors, is frequently styled positive law, or law existing *by position*. As contradistinguished to the rules which I style positive morality, and on which I shall touch immediately, the aggregate of the rules, established by political superiors, may also be marked commodiously with the name of positive law. For the sake, then, of getting a name brief and distinctive at once, and agreeably to frequent usage, I style that aggregate of rules, or any portion of that aggregate, positive law: though rules, which are not established by political superiors, are also positive, or exist by position, if they be rules or laws, in the proper signification of the term.

2nd class.  
Laws set  
by men not  
political  
superiors.

5. Though some of the laws or rules, which are set by men to men, are established by political superiors, others are not established by political superiors, or are not established by political superiors in that capacity or character.

Objects im-  
properly

6. Closely analogous to human laws of this second class, are a set of objects frequently but improperly termed laws,

being rules set and enforced by *mere opinion*, that is, by the but by opinions or sentiments held or felt by an indeterminate *close analogy* body of men in regard to human conduct. Instances of such *termed* a use of the term *law* are the expressions—‘The law of *laws* honour’; ‘The law set by fashion’; and rules of this species constitute much of what is usually termed ‘International law.’

\*7. The aggregate of human laws properly so called *The two* belonging to the second of the classes above mentioned, *last placed* with the aggregate of objects improperly but by *in one class* close analogy termed laws, I place together in a common class, *under the* and denote them by the term *positive morality*. The name *name positive morality* morality severs them from positive law, while the epithet *ity.* positive disjoins them from the law of God. And to the end of obviating confusion, it is necessary or expedient that they should be disjoined from the latter by that distinguishing epithet. For the name morality (or morals), when standing unqualified or alone, denotes indifferently either of the following objects: namely, positive morality *as it is*, or without regard to its merits; and positive morality, *as it would be*, if it conformed to the law of God, and were, therefore, deserving of approbation.

8. Besides the various sorts of rules which are included *Objects* in the literal acceptation of the term law, and those which *metaphorically* are by a close and striking analogy, though, improperly, *termed* termed laws, there are numerous applications of the term *laws.* law, which rest upon a slender analogy and are merely metaphorical or figurative. Such is the case when we talk of laws observed by the lower animals; of laws regulating the growth or decay of vegetables; of laws determining the movements of inanimate bodies or masses. For where intelligence is not, or where it is too bounded to take the name of reason, and, therefore, is too bounded to conceive the purpose of a law, there is not the will

which law can work on, or which duty can incite or restrain.\*

9. Having suggested the purpose of my attempt to determine the province of jurisprudence; to distinguish positive law, the appropriate matter of jurisprudence, from the various objects to which it is related by resemblance, and to which it is related, nearly or remotely, by a strong or slender analogy: I shall now state the essentials of a *law* or *rule* (taken with the largest signification which can be given to the term *properly*).

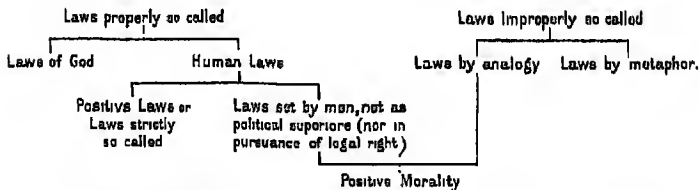
Laws or rules properly so called, are as pieces of commands.

10. Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*. Or, rather, laws or rules, properly so called, are a species of commands.\*

11. Now, since the term command comprises the term law, the first is the simpler as well as the larger of the two. But, simple as it is, it admits of explanation. And, since it is the key to the sciences of jurisprudence and morals, its meaning should be analysed with precision.

12. Accordingly, I shall endeavour, in the first instance, to analyse the meaning of 'command': an analysis which, I fear, will task the patience of my hearers, but which they

8. The classification suggested in the text may be arranged in tabular form:



Q. In what senses of the term law may it be applied to the rules which are imposed on lunatics living within the walls of an asylum?

10. Q. Austin makes this statement as if it were a self-evident truth. Has he good reason for doing so? If not self-evident, is it true? Cf. Hobbes: *Leviathan*, xxv.—vi.

will bear with cheerfulness, or, at least, with resignation, if they consider the difficulty of performing it. The elements of a science are precisely the parts of it which are explained least easily. Terms that are the largest, and, therefore, the simplest of a series, are without equivalent expressions into which we can resolve them concisely. And when we endeavour to define them, or to translate them into terms which we suppose are better understood, we are forced upon tedious circumlocutions.

13. If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command. The meaning of the term *command*. A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase. If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request. 'Preces erant, sed quibus contradicere non posset.' Such is the language of Tacitus, when speaking of a petition by the soldiery to a son and lieutenant of Vespasian.

14. A command, then, is a signification of desire. But a command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire.

15. Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it. If, in spite of The meaning of the term *duty*.

that evil in prospect, I comply not with the wish which you signify, I am said to disobey your command, or to violate the duty which it imposes.

The terms  
*command*  
and *duty*  
are cor-  
relative.

16. Command and duty are, therefore, correlative terms: the meaning denoted by each being implied or supposed by the other. Or (changing the expression) wherever a duty lies, a command has been signified; and whenever a command is signified, a duty is imposed.

The mean-  
ing of the  
term *sanction*.

17. The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a *sanction*, or an *enforcement of obedience*. Or (varying the phrase) the command or the duty is said to be *sanctioned* or *enforced* by the chance of incurring the evil.

18. Considered as thus abstracted from the command and the duty which it enforces, the evil to be incurred by disobedience is frequently styled a punishment. But, as punishments, strictly so called, are only a class of sanctions, the term is too narrow to express the meaning adequately.

To the ex-  
istence of a  
command,  
a duty, and  
a sanction,  
a violent  
motive to  
compli-  
ance is not  
requisite.

19. I observe that Dr. Paley, in his analysis of the term *obligation*, lays much stress upon the violence of the motive to compliance. In so far as I can gather a meaning from his loose and inconsistent statement, his meaning appears to be this: that unless the motive to compliance be violent or intense, the expression or intimation of a wish is not a command, nor does the party to whom it is directed lie under a duty to regard it.

20. The truth is, that the magnitude of the eventual evil, and the magnitude of the chance of incurring it, are foreign to the matter in question. The greater the eventual evil, and the greater the chance of incurring it, the greater is the efficacy of the command, and the greater is the strength of the obligation. But where there is the smallest chance of incurring the smallest evil, the expression of a wish amounts

to a command, and, therefore, imposes a duty. The sanction, if you will, is feeble or insufficient; but still there is a sanction, and, therefore, a duty and a command."

21. By some celebrated writers (by Locke, Bentham, and, I think, Paley), the term sanction is applied to conditional good as well as to conditional evil: to reward as well as to punishment. But, with all my habitual veneration for the names of Locke and Bentham, I think that this extension of the term is pregnant with confusion and perplexity. Rewards  
are not  
sanctions

22. Rewards are, indisputably, motives to comply with the wishes of others. But to talk of commands and duties as sanctioned or enforced by rewards, or to talk of rewards as obliging or constraining to obedience, is surely a wide departure from the established meaning of the terms.

23. If you expressed a desire that I should render a service, and if you proffered a reward as the motive or inducement to render it, you would scarcely be said to

20. Q. (1) Austin's statement is open to objection on the ground that the phrase, "the smallest chance of incurring the smallest evil," reduces the definition of command to an absurdity. It would be more consistent with Austin's general analysis to require a real chance of a real evil. But assuming this to be the case, who is to decide whether such a chance exists? The person who is commanded? The person who commands? Or a third party? Give reasons in either case.

(2) Is a command issued to B in the following cases?

(a) B dreads A's displeasure. A, who is ignorant of the fact, asks B to lend him £5, adding, "If you deny me this kindness, I shall think you very mean."

(b) B is ordered by C, his medical adviser, to take a tour round the world. C adds, "If you do not go, I will not answer for the consequences."

(c) B is requested by D to marry D's daughter. D threatens B, in case of non-compliance, with a punishment which he does not expect to be able to inflict, but intends to inflict if he can.

(d) B is ordered by E to do something under threat of a thrashing. E has not the slightest intention to carry out the threat.

command the service, nor should I, in ordinary language, be obliged to render it. In ordinary language, you would promise me a reward, on condition of my rendering the service, whilst I might be incited or persuaded to render it by the hope of obtaining the reward.

24. Again: If a law hold out a reward as an inducement to do some act, an eventual right is conferred, and not an obligation imposed, upon those who shall act accordingly: The imperative part of the law being addressed or directed to the party whom it requires to render the reward.

25. In short, I am inclined to comply with the wish of another, by the fear of disadvantage or evil. I am also inclined to comply with the wish of another, by the hope of advantage or good. But it is only by the chance of incurring evil, that I am bound or obliged to compliance. It is only by conditional evil, that duties are sanctioned or enforced. It is the power and the purpose of inflicting eventual evil, and not the power and the purpose of imparting eventual good, which gives to the expression of a wish the name of a command.

26. If we put reward into the import of the term sanction, we must engage in a toilsome struggle with the current of ordinary speech; and shall often slide unconsciously, notwithstanding our efforts to the contrary, into the narrower and customary meaning.\*

26. Q. (1) A says to B, "Do this and I will give you the £5 I owe you. If you do not do it, I will certainly give you nothing." Does A command B? (2) What have been the reasons which have determined the State to rely upon penalties rather than rewards?

*Note.*—The consideration of such questions as those suggested may lead the student to doubt the propriety of Austin's refusal to admit the possibility of a sanction of reward. Ulpian declared the purpose of law to consist in securing good conduct, "not only by the fear of punishment, but also by the hope of reward."<sup>1</sup>

---

<sup>1</sup> Digest I. i. 1.

27. It appears, then, from what has been premised, that The the ideas or notions comprehended by the term *command* are <sup>notions</sup>

As Thoring has remarked, although the public recompense has a purely social expression in modern society, it had at Rome a legal expression. The general of the army had a right to the triumph, a soldier a right to one or other of the Roman military orders, and in either case the right was one of which the tribunals would take cognizance.<sup>1</sup> The modern titles of nobility, on the other hand, wholly depend upon the grace of the sovereign.

It would be possible to go further than Locke, and claim that a command may be sanctioned by the reverence for an authority as well as the fear of punishment or the hope of recompense. Thus some chivalrously-minded people might say that the invitation of the King or the request of a fair lady is *per se* a command. The matter is not purely one of courtesy. "He alone lives by the Divine Law," said Spinoza, "who loves God not from fear of punishment, or from love of any other object, such as sensual pleasure, fame, or the like; but solely because he has knowledge of God or is convinced that the knowledge and love of God is the highest good." Divine law so regarded is a command, not through fear of punishment, but for love and reverence of the Divine Being.

Such differences of opinion with respect to the definition of sanction and the essence of command are referred to, not to confute Austin, but to bring out the meaning and significance of his position. It is not until we have dealt with objections to a position that we understand what that position really is. I have discussed the general question in *Excursus E.* If, as I have there argued, positive law is something more than command, it is at least command, and is sanctioned typically by penalties. In this connection a very practical question may be asked: Does the Austinian conception of sanction cover the cases described as sanctions of nullity? The question is illustrated by the case of *Cowan v. Milbourn*.<sup>2</sup> In that case the defendant agreed to let rooms to the plaintiff, but after discovering that the rooms were intended to be used for the purpose of delivering lectures of a blasphemous character, he refused to stand by the agreement. It was held by the court that, since the object of the contract was illegal, the contract could not be enforced at law. Baron Bramwell, in his judgment, said: "It is strange there should be so much difficulty in making it understood that a thing might be unlawful, in the sense that the law will not aid it, and yet that

<sup>1</sup> "L'Evolution du Droit," pp. 324-6.      <sup>2</sup> L. R. 2 Exch. 230.



compre- the following. 1. A wish or desire conceived by a rational  
hended by being, that another rational being shall do or forbear. 2. An  
the term evil to proceed from the former, and to be incurred by the  
command. latter, in case the latter comply not with the wish. 3. An  
expression or intimation of the wish by words or other  
signs.

The inse- 28. It also appears from what has been premised, that  
parable connection of the terms: that each embraces the same ideas as the others,  
of the three though each denotes these ideas in a peculiar order or  
terms, series.

command, duty, and sanction. 29. 'A wish conceived by one, and expressed or intimated

the law will not immediately punish it. If that only were unlawful to which a penalty is attached the consequence would be that, inasmuch as no penalty is provided by the law for prostitution, a contract having prostitution for its object would be valid in a court of law." The command of the State implied in the judgment of Baron Bramwell may be expressed as a prohibition of the making of certain kinds of contract—prohibition sanctioned, not by a positive penalty, but by a mere refusal to enforce the contract. Can we regard this negative punishment as included within the Austinian conception of sanction? "I agree," wrote Sidgwick, "with critics of Austin in thinking that the conception of 'command'—implying announcement of wish, together with power and purpose of punishing its violation—can only be applied in an indirect way, and by a process of inference sometimes rather complicated, to many of the rules that make up the aggregate of civil law. Still I think that Austin's conception is always applicable, if it is interpreted as meaning only that the expectation of some penalty, to result from the action or inaction of government or its subordinates, constitutes a motive for conforming to the rules we call 'laws,' and supplies a broadly distinctive characteristic of such rules; though the penalty (1) may consist only in the enforced payment of damages to a private individual injured by the violation of the rule, or (2) may be merely negative, and consist in the withdrawal from the law-breaker of some governmental protection of his interests to which he would otherwise have been entitled."<sup>1</sup>

<sup>1</sup> "Elements of Politics," p. 22 n.; cf. Hearn, "Legal Duties and Rights," pp. 83-8.

to another, with an evil to be inflicted and incurred in case the wish be disregarded,' are signified directly and indirectly by each of the three expressions. Each is the name of the same complex notion.

30. But when I am talking directly of the expression or intimation of the wish, I employ the term command: The expression or intimation of the wish being presented prominently to my hearer; whilst the evil to be incurred, with the chance of incurring it, are kept (if I may so express myself) in the background of my picture.

31. When I am talking directly of the chance of incurring the evil, or (changing the expression) of the liability or obnoxiousness to the evil, I employ the term duty, or the term obligation: The liability or obnoxiousness to the evil being put foremost, and the rest of the complex notion being signified implicitly.

32. When I am talking immediately of the evil itself, I employ the term sanction, or a term of the like import: The evil to be incurred being signified directly; whilst the obnoxiousness to that evil, with the expression or intimation of the wish, are indicated indirectly or obliquely.

33. To those who are familiar with the language of logicians (language unrivalled for brevity, distinctness, and precision), I can express my meaning accurately in a breath.—Each of the three terms *signifies* the same notion; but each *denotes* a different part of that notion, and *connotes* the residue.

34. Commands are of two species. Some are *laws* or *rules*. The others have not acquired an appropriate name, nor does language afford an expression which will mark them briefly and precisely. I must, therefore, note them as well as I can by the ambiguous and inexpressive name of 'occasional or particular commands.'

35. The term *laws* or *rules* being not unfrequently applied

The manner of that connection

Laws or rules distinguished from commands which are occasional or particular.

to occasional or particular commands, it is hardly possible to describe a line of separation which shall consist in every respect with established forms of speech. But the distinction between laws and particular commands may, I think, be stated in the following manner.

36. By every command, the party to whom it is directed is obliged to do or to forbear.

37. Now where it obliges *generally* to acts or forbearances of a *class*, a command is a law or rule. But where it obliges to a *specific* act or forbearance, or to acts or forbearances which it determines *specifically* or *individually*, a command is occasional or particular. In other words, a class or description of acts is determined by a law or rule, and acts of that class or description are enjoined or forbidden generally. But where a command is occasional or particular, the act or acts, which the command enjoins or forbids, are assigned or determined by their specific or individual natures as well as by the class or description to which they belong.

38. The statement which I have given in abstract expressions I will now endeavour to illustrate by apt examples.

39. If you command your servant to go on a given errand, or *not* to leave your house on a given evening, or to rise at such an hour on such a morning, or to rise at that hour during the next week or month, the command is occasional or particular. For the act or acts enjoined or forbidden are specially determined or assigned.

40. But if you command him simply to rise at that hour, or to rise at that hour always, or to rise at that hour till further orders, it may be said, with propriety, that you lay down a rule for the guidance of your servant's conduct. For no specific act is assigned by the command, but the command obliges him generally to acts of a determined class.

41. If a regiment be ordered to attack or defend a post, or to quell a riot, or to march from their present quarters,

the command is occasional or particular. But an order to exercise daily till further orders shall be given would be called a general order, and might be called a rule.

42. If Parliament prohibited simply the exportation of corn, either for a given period or indefinitely, it would establish a law or rule: a kind or sort of acts being determined by the command, and acts of that kind or sort being generally forbidden. But an order issued by Parliament to meet an impending scarcity, and stopping the exportation of corn *then shipped and in port*, would not be a law or rule, though issued by the sovereign legislature. The order regarding exclusively a specified quantity of corn, the negative acts or forbearances, enjoined by the command, would be determined specifically or individually by the determinate nature of their subject.

43. As issued by a sovereign legislature, and as wearing the form of a law, the order which I have now imagined would probably be called a law. And hence the difficulty of drawing a distinct boundary between laws and occasional commands.

44. Again: An act which is not an offence, according to the existing law, moves the sovereign to displeasure: and, though the authors of the act are legally innocent or unoffending, the sovereign commands that they shall be punished. As enjoining a specific punishment in that specific case, and as not enjoining generally acts or forbearances of a class, the order uttered by the sovereign is not a law or rule.

45. Whether such an order would be called a law, seems to depend upon circumstances which are purely immaterial: immaterial, that is, with reference to the present purpose, though material with reference to others. If made by a sovereign assembly deliberately, and with the forms of legislation, it would probably be called a law. If uttered by an absolute monarch, without deliberation or ceremony, it would

scarcely be confounded with acts of legislation, and would be styled an arbitrary command. Yet, on either of these suppositions, its nature would be the same. It would not be a law or rule, but an occasional or particular command of the sovereign One or Number.

46. To conclude with an example which best illustrates the distinction, and which shows the importance of the distinction most conspicuously, judicial commands are commonly occasional or particular, although the commands which they are calculated to enforce are commonly laws or rules.

47. For instance, the lawgiver commands that thieves shall be hanged. A specific theft and a specified thief being given, the judge commands that the thief shall be hanged, agreeably to the command of the lawgiver.

48. Now the lawgiver determines a class or description of acts; prohibits acts of the class generally and indefinitely; and commands, with the like generality, that punishment shall follow transgression. The command of the lawgiver is, therefore, a law or rule. But the command of the judge is occasional or particular. For he orders a specific punishment, as the consequence of a specific offence.

49. According to the line of separation which I have now attempted to describe, a law and a particular command are distinguished thus.—Acts or forbearances of a *class* are enjoined *generally* by the former. Acts *determined specifically*, are enjoined or forbidden by the latter.

Black-  
stone's ac-  
count of  
the dis-  
tinction.

50. A different line of separation has been drawn by Blackstone and others. According to Blackstone and others, a law and a particular command are distinguished in the following manner.—A law obliges *generally* the members of the given community, or a law obliges *generally* persons of a given class. A particular command obliges a *single* person, or persons whom it determines *individually*.

51. That laws and particular commands are not to be distinguished thus, will appear on a moment's reflection.

52. For, first, commands which oblige generally the members of the given community, or commands which oblige generally persons of given classes, are not always laws or rules.

53. Thus, in the case already supposed; that in which the sovereign commands that all corn actually shipped for exportation be stopped and detained; the command is obligatory upon the whole community, but as it obliges them only to a set of acts individually assigned, it is not a law. Again, suppose the sovereign to issue an order, enforced by penalties, for a general mourning, on occasion of a public calamity. Now, though it is addressed to the community at large, the order is scarcely a rule, in the usual acceptation of the term. For, though it obliges generally the members of the entire community, it obliges to acts which it assigns specifically, instead of obliging generally to acts or forbearances of a class. If the sovereign commanded his subjects to wear black, his command would amount to a law. But if he commanded them to wear black on a specified occasion, his command would be merely particular.

54. And, secondly, a command which obliges exclusively persons individually determined, may amount, notwithstanding, to a law or a rule.

55. For example, a father may set a rule to his child or children: a guardian, to his ward: a master, to his slave or servant. And certain of God's laws were as binding on the first man, as they are binding at this hour on the millions who have sprung from his loins.

56. Most, indeed, of the laws which are established by *Privilegia*, political superiors, or most of the laws which are simply and strictly so called, oblige generally the members of the

political community, or oblige generally persons of a class. To frame a system of duties for every individual of the community, were simply impossible; and if it were possible, it were utterly useless. Most of the laws established by political superiors are, therefore, *general* in a twofold manner: as enjoining or forbidding generally acts of kinds or sorts: and as binding the whole community, or, at least, whole classes of its members. Laws established by political superiors, and exclusively binding specified or determinate persons, are styled in the language of the Roman jurists, *privilegia*. Though that, indeed, is a name which will hardly denote them distinctly: for, like most of the leading terms in actual systems of law, it is not the name of a definite class of objects, but of a heap of heterogeneous objects. It may be noted that where a *privilegium* merely imposes a duty, it exclusively obliges a determinate person or persons. But where a *privilegium* confers a right, and the right conferred avails against the world at large, the law is *privilegium* as viewed from a certain aspect, but is also a general law as viewed from another aspect. In respect of the right conferred, the law exclusively regards a determinate person, and, therefore, is *privilegium*. In respect of the duty imposed, and corresponding to the right conferred, the law regards generally the members of the entire community.

The definition of a law or rule, properly so called. 57. It appears from what has been premised, that a law, properly so called, may be defined in the following manner.

58. A law is a command which obliges a person or persons.

59. But, as contradistinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons, and obliges generally to acts or forbearances of a class.

60. In language more popular but less distinct and precise, a law is a command which obliges a person or persons to a *course* of conduct."

60. Q. (1) Most laws have a general application, but it is one thing to say generality is a normal element of law, and quite another to say that it is an essential element. What reasons can be assigned for insisting on generality as an essential element?

2. Apply Austin's test of generality of command to the following cases:—

(a) A prohibition from fishing for salmon in a particular stream during a particular season.

(b) The orders of an officer to a particular sentinel

(a) to shoot all trespassers,

(b) in no case to leave his post until so directed.

(c) A special proclamation by the sovereign calling upon all subjects to refrain from molesting an ambassador then passing through the country.

(d) An Act of Parliament, passed in the first instance for ten years only, but periodically re-enacted, requiring all who wish to sell alcoholic drinks to take out a license annually.

*Note.*—The student who has dealt conscientiously with the above questions will perhaps pardon a few suggestions with respect to the following topics: (1) the meaning of the Austinian test of generality; (2) the tests proposed by other writers; (3) the grounds for excluding particular commands from the province of jurisprudence; (4) the general argument of this present chapter.

(1) *The meaning of the Austinian test of general commands.* Austin's attempt to establish a test is not free from ambiguity. This is particularly apparent with regard to forbearances. B orders A to call him at eight each morning for the next three weeks. Clearly a particular command. The case would not be so simple if the order had been "not to leave the house this or any other evening for the next three weeks." Such a command might involve an indefinite number of forbearances if the temptation to leave the house were constantly present to B's mind. I take Austin's general idea to be that a law aims at determining a *course of conduct*. The test which he proposes for determining in a given case whether or not a course of conduct is proscribed, implies the consideration of questions which might be expressed as follows: What is the reasonable construction to be put upon the mental attitude of the person who commands? Does he, or does he not, contemplate a definitely limited number of acts or forbearances on the part of the person commanded? In dealing with such questions all the circumstances of the case must be taken into con-



The meaning of the correlative terms *superior* and *inferior*.

61. Laws and other commands are said to proceed from *superiors*, and to bind or oblige *inferiors*. I will, therefore, analyse the meaning of those correlative expressions; and consideration, and among such circumstances a time limit would be of some, though not conclusive value. If on January 1, a master issues an order to his servant which is to be carried out once each morning for the whole year, it would be surely pedantry to describe the command as particular. Logically, three hundred and sixty-five acts are enjoined; practically, the attitude of the person commanding may be more justly expressed by saying that he wishes to enjoin a rule of conduct, the limitation of the command to a certain period of time being in all probability an irrelevant detail.

(2) *Some tests proposed by other writers.* The Roman jurist Ateius Capito opposed *Lex*, "*generale jussum populi aut plebis, rogante magistratu*," to *Privilegia*, "*jussa de singulis concepta*."<sup>1</sup> Similarly Ulpian: "*Jura non in singulas personas, sed generaliter constituuntur*."<sup>2</sup> Austin's account of Blackstone's conception of generality is criticized by Professor Clark, who contends that Blackstone really meant a standing order as distinguished from an occasional one.<sup>3</sup> Some writers have combined both tests of generality, requiring that the command must apply to an indefinite number of persons as well as enjoin an indefinite number of acts. Sheldon Amos, on the other hand, repudiated both tests as valueless and misleading. "The most apparently isolated decree, if imperative and peremptory, is addressed to all the members of the Executive needed to carry it into effect,<sup>4</sup> and to all persons in the community capable of interfering with its being carried into effect." M. Esmein proposes the test of perpetuity. If an Act of the sovereign legislature is to be regarded as a law, it must be passed for an indefinite period.<sup>5</sup> "On reconnait," writes M. Duguit, "*qu'une disposition est une règle générale et abstraite, quand elle ne s'épuise pas par son application dans un cas prévu et déterminé d'avance, quand elle survit à cette application, alors même qu'en fait elle ne s'applique qu'à un seul cas, ou même qu'à un seul individu*."<sup>6</sup>

(3) *The real grounds for insisting upon generality as an essential element in law.* A *prima facie* case is made out for insisting upon generality from the mere fact that so many jurists, though perhaps

<sup>1</sup> Willems, "*Le Droit Public romain*," p. 178.

<sup>2</sup> Digest 1, 3, 8.      <sup>3</sup> *v.* "Practical Jurisprudence," p. 112.

<sup>4</sup> "Science of Jurisprudence," p. 74.

<sup>5</sup> "Éléments de Droit constitutionnel," 1899, p. 9.

<sup>6</sup> "Le Droit objectif et la Loi positive," 1901, p. 503.

will try to strip them of a certain mystery, by which that simple meaning appears to be obscured.

differing as to the precise test of generality, agree in demanding *some* test. The Roman tradition on this point is sufficiently indicated by the quotations already cited. Bacon affirms in his collection of juristic aphorisms, "*Law is nothing else than a commanding rule.*"<sup>1</sup> Rousseau, though less influenced by scientific considerations, elaborates the position that Law considers subjects in a body and actions as abstract, never a man as an individual nor an action as singular.<sup>2</sup> "The French doctrine of to-day," writes M. Duguit, "holds almost unanimously that generality is an essential element of law (*la loi*)."<sup>3</sup> The author gives a very practical significance to the question by contending that the Act of 1886, which exiled from French territory the heads of families which had reigned in France, together with their direct heirs, was arbitrary and illegal.

A very brief reflection is sufficient to convince us that juristic opinion in this matter rests upon the firm foundation of the very nature of society. Aristotle, in discussing the question whether it is better to be subject to the best man or to the best laws, refers to the argument that laws are general in their terms and therefore cannot meet particular cases. "Even in Egypt, a doctor can alter the prescribed course of treatment after three days." Hence he concludes that a polity which rests upon written formulæ or laws is not the best. On the other hand, he is careful to point out that officers of State should proceed according to general principles. He concludes in favour of having a code of laws, while at the same time allowing officers of State to act independently wherever the needs of the particular case may demand it.<sup>4</sup> Although throughout the argument he assumes that laws *must* be general, his statement discloses some of the reasons why generality is desirable. The reasons have also been stated by Sir Henry Maine, who points out that the distance of the sovereign from the bulk of the subjects compels him to deal with great classes of acts and with great classes of persons, rather than with isolated acts and with particular individuals.<sup>5</sup> This has not always been the case, and the author just quoted remarks that, in the small family groups of early society, laws as commands would have been less associated with invariable order than with inscrut-

"De Augmentis," Lib. VIII.

"Le Contrat Social," II, chap. vi.

"Le Droit objectif et la Loi positive," 1901, p. 509.

"Politics," Book III, chap. xv.

"Early History of Institutions," p. 393.

62. *Superiority* is often synonymous with precedence or excellence. We talk of superiors in rank; of superiors in wealth; of superiors in virtue: comparing certain persons with certain other persons; and meaning that the former precede or excel the latter in rank, in wealth, or in virtue.

63. But, taken with the meaning wherein I here understand it, the term *superiority* signifies might: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes.

able caprice. In the modern state, however, the State necessarily governs by the general way. True, cases may arise for particular action, but such action, even though it may assume the form of law, must be carefully distinguished from that law which is the subject-matter of legal science. For the purposes of such a science, the particular commands of a sovereign are *des quantités négligeables*.

(4) *Review of Austin's general argument.* The steps in Austin's general argument may be expressed as follows: Law is a command (§ 10). It therefore involves the elements of duty and sanction (§ 17). It also involves the elements of superiority (§ 70) and of generality (§§ 34-60). In a word, Law implies not merely Power controlling human action, but also Power controlling *courses* of human action. There seems no adequate reason for failing to insist upon generality of persons as well as of acts. The grounds which apply in one case apply also in the other. Austin's failure in this respect may be attributed perhaps to an oversight of the fact that a command, apparently to an individual, is often really addressed to a class. An Act of Parliament applying to the Lord Chancellor, applies to him not as a particular person, but as holder for the time being of a certain office.<sup>1</sup> On the other hand, an Act of Parliament which applies to a particular individual or enjoins a definitely limited number of acts is to be described as an act of administration rather than of legislation. It assumes the form, though not the nature, of law. The distinction between legislative and administrative functions, however, has difficulties of its own, to which I shall return in the note on § 289.

<sup>1</sup> Cf. also Pollock, "Jurisprudence," p. 34; Markby, "Elements of Law," p. 2; Clark, "Practical Jurisprudence," pp. 112-13.

64. For example, God is emphatically the *superior* of Man. For his power of affecting us with pain, and of forcing us to comply with his will is unbounded and resistless.

65. To a limited extent, the sovereign One or Number is the superior of the subject or citizen: the master, of the slave or servant: the father, of the child.

66. In short, whoever can oblige another to comply with his wishes, is the superior of that other, so far as the ability reaches: the party who is obnoxious to the impending evil, being, to that same extent, the inferior.

67. The might or superiority of God, is simple or absolute. But in all or most cases of human superiority, the relation of superior and inferior, and the relation of inferior and superior, are reciprocal. Or (changing the expression) the party who is the superior as viewed from one aspect, is the inferior as viewed from another.

68. For example, to an indefinite, though limited extent, the monarch is the superior of the governed: his power being commonly sufficient to enforce compliance with his will. But the governed, collectively or in mass, are also the superior of the monarch: who is checked in the abuse of his might by his fear of exciting their anger; and of rousing to active resistance the might which slumbers in the multitude.

69. A member of a sovereign assembly is the superior of the judge: the judge being bound by the law which proceeds from that sovereign body. But, in his character of citizen or subject, he is the inferior of the judge: the judge being the minister of the law, and armed with the power of enforcing it.

70. It appears, then, that the term *superiority* (like the terms *duty* and *sanction*) is implied by the term *command*. For superiority is the power of enforcing compliance with a wish: and the expression or intimation of a wish, with the

power and the purpose of enforcing it, are the constituent elements of a command.

71. 'That laws emanate from superiors' is, therefore, an identical proposition. For the meaning which it affects to impart is contained in its subject.

72. If I mark the peculiar source of a given law, or if I mark the peculiar source of laws of a given class, it is possible that I am saying something which may instruct the hearer. But to affirm of laws universally 'that they flow from superiors,' or to affirm of laws universally 'that inferiors are bound to obey them,' is the merest tautology.

Laws (*im-*  
*properly* so  
called)  
which are  
not com-  
mands,  
and yet are  
within the  
province  
of juris-  
prudence.

73. Like most of the leading terms in the sciences of jurisprudence and morals, the term *laws* is extremely ambiguous. Taken with the largest signification which can be given to the term properly, *laws* are a species of commands. But the term is improperly applied to various objects which have nothing of the imperative character: to objects which are not commands; and which, therefore, are not laws, properly so called.

74. Accordingly, the proposition 'that laws are commands' must be taken with limitations. Or, rather, we must distinguish the various meanings of the term *laws*; and must restrict the proposition to that class of objects which is embraced by the largest signification that can be given to the term properly.

75. I have already indicated, and shall hereafter more fully describe, the objects improperly termed laws, which are not within the province of jurisprudence (being either rules enforced by opinion and closely analogous to laws properly so called, or being laws so called by a metaphorical application of the term merely). There are other objects improperly termed laws (not being commands) which yet may properly be included within the province of jurisprudence. These I shall endeavour to particularize:—

76. (1) Acts on the part of legislatures to *explain* positive law, can scarcely be called laws, in the proper signification of the term. Working no change in the actual duties of the governed, but simply declaring what those duties are, they properly are acts of interpretation by legislative authority. Or, to borrow an expression from the writers on the Roman Law, they are acts of authentic interpretation.

1. Acts to explain positive laws.

77. But, this notwithstanding, they are frequently styled laws; declaratory laws, or declaratory statutes. They must, therefore, be noted as forming an exception to the proposition 'that laws are a species of commands.'

78. It often, indeed, happens (as I shall show in the proper place), that laws declaratory in name are imperative in effect: Legislative, like judicial interpretation, being frequently deceptive; and establishing new law, under guise of expounding the old.\*

79. (2) Laws to repeal laws, and to release from existing duties, must also be excepted from the proposition 'that laws are a species of commands.' In so far as they release from duties imposed by existing laws, they are not commands, but revocations of commands. They authorize or permit the parties to whom the repeal extends, to do or to forbear from acts which they were commanded to forbear from or to do. And, considered with regard to this, their immediate or direct purpose, they are often named *permissive laws*, or, more briefly and more properly, *permissions*.

2. Laws to repeal laws.

78. In Great Britain the operation of Declaratory Acts is not retrospective to the extent of depriving a party of a vested right unless such effect is explicitly demanded by the language of the Act. But if such explicit demand is made, the courts are bound by it. In the United States, however, such an attempt on the part of the legislature would be held invalid by the courts as an unlawful assumption of judicial power.<sup>1</sup>

80. Remotely and indirectly, indeed, permissive laws are often or always imperative. For the parties released from duties are restored to liberties or rights: and duties answering those rights are, therefore, created or revived.

81. But this is a matter which I shall examine with exactness, when I analyse the expressions 'legal right,' 'permission by the sovereign or state,' and 'civil or political liberty.'

3. Laws of  
imperfect  
obligation.

82. (3) Imperfect laws, or laws of imperfect obligation, must also be excepted from the proposition 'that laws are a species of commands.'

83. An imperfect law (with the sense wherein the term is used by the Roman jurists) is a law which wants a sanction, and which, therefore, is not binding. A law declaring that certain acts are crimes, but annexing no punishment to the commission of acts of the class, is the simplest and most obvious example.

84. Though the author of an imperfect law signifies a desire, he manifests no purpose of enforcing compliance with the desire. But where there is not a purpose of enforcing compliance with the desire, the expression of a desire is not a command. Consequently, an imperfect law is not so much a law, as counsel, or exhortation, addressed by a superior to inferiors.

85. Examples of imperfect laws are cited by the Roman jurists. But with us in England, laws professedly imperative are always (I believe) perfect or obligatory. Where the English legislature affects to command, the English tribunals not unreasonably presume that the legislature exacts obedience. And, if no specific sanction be annexed to a given law, a sanction is supplied by the courts of justice, agreeably to a general maxim which obtains in cases of the kind.

86. The imperfect laws, of which I am now speaking, are laws which are imperfect, in the sense of the Roman jurists;

that is to say, laws which speak the desires of political superiors, but which their authors (by oversight or design) have not provided with sanctions. Many of the writers on morals, and on the so-called law of nature, have annexed a different meaning to the term *imperfect*. Speaking of imperfect obligations, they commonly mean duties which are not legal: duties imposed by commands of God, or duties imposed by positive morality, as contradistinguished to duties imposed by positive law.\*

86. "Lex aut perfecta est, aut imperfecta, aut minus quam perfecta" (Ulpian). The full passage, as restored by Cujas and Schilling, is translated in Abdy and Walker's "Gaius and Ulpian," p. 371.

' "A law is either perfect, or imperfect, or short of perfect.

"A perfect law is one which forbids something to be done, and rescinds it if it be done, of which kind is the *Lex Aelia Sentia*. An imperfect law is one which forbids something to be done, and yet, if it be done, neither rescinds it nor imposes a penalty on him who has acted contrary to the law: of which character is the *Lex Cincia*, prohibiting donations beyond a specified amount, except those to certain persons, relations for instance; and yet not revoking a gift in excess. A law short of perfect is one which forbids something to be done, and if it be done does not rescind it, but imposes a penalty on him who has acted contrary to the law; of which character is the *Lex Furia Testamentaria*, prohibiting all persons, save those specially exempted, from taking more than a thousand asses as a legacy or gift in prospect of death, and appointing a fourfold penalty against anyone who has taken a larger sum."

*Ashby v. White*<sup>1</sup> is the leading authority in English law for the maxim *ubi jus ibi remedium*. The judgment of Lord Holt in that case declared that an injury imports a damage, and sustains an action, even if no pecuniary damage is shown. The franchise, it was asserted, is a right for the vindication of which there must be a legal remedy; if a man were to have no remedy, it would be equivalent to denying the existence of the right.

Q. (1) Might a royal proclamation prescribing a period of national mourning be regarded as a *lex imperfecta*?

(2) Has a judge, who delivers a judgment which is contrary to law, violated a *lex imperfecta*?



Laws (*properly so called*) which may seem not imperative.

87. I believe that I have now reviewed all the classes of objects to which the term *laws* is improperly applied. The laws (improperly so called) which I have here lastly enumerated, are (I think) the only laws which are not commands, and which yet may be properly included within the province of jurisprudence. But though these, with the so-called laws set by opinion and the objects metaphorically termed laws, are the only laws which *really* are not commands, there are certain laws (properly so called) which may *seem* not imperative. Accordingly, I will subjoin a few remarks upon laws of this dubious character.

1. Which merely create rights.

88. (1) There are laws, it may be said, which merely create rights. And, seeing that every command imposes a duty, laws of this nature are not imperative.

89. But, as I have intimated already, and shall show completely hereafter, there are no laws merely creating rights. There are laws, it is true, which merely create duties: duties not correlating with correlating rights, and which, therefore, may be styled *absolute*. But every law, really conferring a right, imposes expressly or tacitly a relative duty, or a duty correlating with the right. If it specify the remedy to be given, in case the right shall be infringed, it imposes the relative duty expressly. If the remedy to be given be not specified, it refers tacitly to pre-existing law, and clothes the right which it purports to create with a remedy provided by that law. Every law, really conferring a right, is, therefore, imperative: as imperative, as if its only purpose were the creation of a duty, or as if the relative duty, which it inevitably imposes, were merely absolute.\*

89. To the difficult cases discussed by Austin Mr. Frederic Harrison adds others, e.g. the rules relating to judicial procedure.<sup>1</sup>

90. (2) According to an opinion which I must notice <sup>2</sup> Custom-  
*incidentally* here, though the subject to which it relates <sup>ary laws.</sup>  
 will be treated *directly* hereafter, *customary laws* must be  
 excepted from the proposition 'that laws are a species of  
 commands.'

91. By many of the admirers of customary laws (and, especially, of their German admirers), they are thought to oblige legally (independently of the sovereign or state), because the citizens or subjects have observed or kept them. Agreeably to this opinion, they are not the creatures of the sovereign or state, although the sovereign or state may

With regard to such cases, three attitudes are possible: (1) We may accept the Austinian analysis as it stands. (2) We may accept Austin's description of law as a command, and contend that the examples are really not inconsistent with the definition. This position is forcibly stated and defended in the article on "Law" in the "Encyclopædia Britannica." "If we avoid the error of treating each separate proposition enunciated by the lawgiver as a law, the cases in question need give us no trouble. Read the declaratory and repealing statutes along with the principal laws which they affect, and the result is perfectly consistent with the proposition that all law is to be resolved into a species of command. . . . Rules of procedure again have been alleged to constitute another exception. They cannot, it is said, be regarded as commands involving punishment if they be disobeyed. Nor is anything gained by considering them as commands addressed to the judge and other ministers of the law. There may be, no doubt, in the law of procedure a great deal which is resolvable into law in this sense, but the great bulk of it is to be regarded, like the rules of interpretation, as entering into the substantive commands which are laws. They are descriptions of the sanction and its mode of working."<sup>1</sup> (3) We may modify or vary Austin's definition of law. This is the course adopted by Professor Holland: "Such cases will cease to be anomalous if we recognize that every law is a proposition announcing the will of the State, and implying, if not expressing, that the State will give effect only to acts which are in accordance with its will, so announced, while it will punish, or at least visit with nullity, any acts of a contrary character."<sup>2</sup>

<sup>1</sup> XIV, p. 358; cf. Markby, "Elements of Law," § 6, and *infra*, Excursus E.

<sup>2</sup> "Jurisprudence," 9th ed., pp. 82-4.

abolish them at pleasure. Agreeably to this opinion, they are positive law (or law, strictly so called), inasmuch as they are enforced by the courts of justice: But, that notwithstanding, they exist as *positive law* by the spontaneous adoption of the governed, and not by position or establishment on the part of political superiors. Consequently, customary laws, considered as positive law, are not commands. And, consequently, customary laws, considered as positive law, are not laws or rules properly so called.

92. An opinion less mysterious, but somewhat allied to this, is not uncommonly held by the adverse party: by the party which is strongly opposed to customary law; and to all law made judicially, or in the way of judicial legislation. According to the latter opinion, all judge-made law, or all judge-made law established by *subject* judges, is purely the creature of the judges by whom it is established immediately. To impute it to the sovereign legislature, or to suppose that it speaks the will of the sovereign legislature, is one of the foolish or knavish fictions with which lawyers, in every age and nation, have perplexed and darkened the simplest and clearest truths.

93. I think it will appear, on a moment's reflection, that each of these opinions is groundless: that customary law is imperative, in the proper signification of the term; and that all judge-made law is the creature of the sovereign or state.

94. At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only

force, which it can be said to possess, from the general disapprobation falling on those who transgress it.

95. Now when judges transmute a custom into a legal rule (or make a legal rule not suggested by a custom), the legal rule which they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated. The rules which he makes derive their legal force from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. For, since the state may reverse the rules which he makes, and yet permits him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration.

96. The admirers of customary law love to trick out their idol with mysterious and imposing attributes. But to those who can see the difference between positive law and morality, there is nothing of mystery about it. Considered as rules of positive morality, customary laws arise from the consent of the governed, and not from the position or establishment of political superiors. But, considered as moral rules turned into positive laws, customary laws are established by the state: established by the state directly, when the customs are promulgated in its statutes; established by the state circuitously, when the customs are adopted by its tribunals.

97. The opinion of the party which abhors judge-made laws, springs from their inadequate conception of the nature of commands.

98. Like other significations of desire, a command is express or tacit. If the desire be signified by words (written or spoken), the command is express. If the desire be signified by conduct (or by any signs of desire which are *not* words), the command is tacit.

99. Now when customs are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are *tacit* commands of the sovereign legislature. The state, which is able to abolish, permits its ministers to enforce them: and it, therefore, signifies its pleasure, by that its voluntary acquiescence, 'that they shall serve as a law to the governed.'

100. My present purpose is merely this: to prove that the positive law styled *customary* (and all positive law made judicially) is established by the state directly or circuitously, and, therefore, is *imperative*. I am far from disputing, that law made judicially (or in the way of improper legislation) and law made by statute (or in the properly legislative manner) are distinguished by weighty differences. I shall inquire, in future lectures, what those differences are; and why subject judges, who are properly ministers of the law, have commonly shared with the sovereign in the business of making it.

Laws  
which are  
not com-  
mands,  
enumer-  
ated.

101. I assume, then, that the only laws which are not imperative, and which belong to the subject-matter of jurisprudence, are the following:—1. Declaratory laws, or laws explaining the import of existing positive law. 2. Laws abrogating or repealing existing positive law. 3. Imperfect laws, or laws of imperfect obligation (with the sense wherein the expression is used by the Roman jurists).

102. But the space occupied in the science by these improper laws is comparatively narrow and insignificant. Accordingly, although I shall take them into account so often as I refer to them directly, I shall throw them out of account on other occasions. Or (changing the expression) I shall limit the term *law* to laws which are imperative, unless I extend it expressly to laws which are not.\*

\* The subject of Customary Law is discussed *infra* Excursus D.

## CHAPTER II

### • THE DIFFERENT KINDS OF LAWS

103. The term *law*, or the term *laws*, is applied to the Laws pro- following objects:—to laws proper or properly so called, and perly so called, and to laws improper or improperly so called: to objects which laws im- have all the essentials of an imperative law or rule, and properly so called, to objects which are wanting in some of those essentials, but to which the term is unduly extended either by reason of analogy or in the way of metaphor.

104. Strictly speaking, all improper laws are analogous to laws proper: and the term *law*, as applied to *any* of them, is a *metaphorical* or *figurative* expression. For every metaphor springs from an analogy: and every analogical extension given to a term is a metaphor or figure of speech. The term is extended from the objects which it properly signifies to objects of another nature; to objects not of the class wherein the former are contained, although they are allied to the former by that more distant resemblance which is usually styled *analogy*.

105. But, taking the expressions with the meanings which Analogy custom or usage has established, there is a difference between and meta- an employment of a term analogically and a metaphor. phor as used in By a metaphorical or figurative application, we usually common parlance, mean one in which the analogy is faint, the alliance between defined. the primitive and the derivative signification remote. When the analogy is clear, strong, and close; when the subjects to which the term is deflected lie on the confines of the class properly denoted by it, and have many of the properties

common to the class, we hardly say that the name is employed figuratively or metaphorically. The difference between metaphor and analogy is hence a difference of degree, and not to be settled precisely by drawing a strict line between them.

Laws im-  
proper are  
of two  
kinds—  
1. Laws by  
analogy.  
2. Laws by  
metaphor.

106. Now a broad distinction obtains between laws improperly so called. Some are closely, others are remotely analogous to laws proper. The term *law* is extended to some by a decision of the reason or understanding. The term *law* is extended to others by a turn or caprice of the fancy.

107. In order that I may mark this distinction briefly and commodiously, I avail myself of the difference, established by custom or usage, between the meanings of the expressions *analogical* and *figurative*.—I style laws of the first kind *laws closely analogous to laws proper*. I say that they are called *laws* by an analogical extension of the term. I style laws of the second kind *laws metaphorical* or *figurative*. I say that they are called laws by a metaphor or figure of speech.

Division of  
laws pro-  
per, and of  
laws by  
analogy.

108. Now laws proper, with such improper laws as are closely analogous to the proper, are divisible thus:—

109. Of laws properly so called, some are set by God to his human creatures, others are set by men to men.

110. Of the laws properly so called which are set by men to men, some are set by men as political superiors, or by men, as private persons, in pursuance of legal rights. Others may be described in the following negative manner. They are not set by men as political superiors, nor are they set by men, as private persons, in pursuance of legal rights.

Laws by  
analogy.

111. The laws improperly so called which are closely analogous to the proper, are merely opinions or sentiments held or felt by men in regard to human conduct. As I shall show hereafter, these opinions and sentiments are

styled laws, because they are analogous to laws properly so called: because they resemble laws properly so called in some of their properties or some of their effects or consequences.

112. Accordingly, I distribute laws proper, with such improper laws as are closely analogous to the proper, under three capital classes.

113. The first comprises the laws (properly so called) which are set by God to his human creatures.

114. The second comprises the laws (properly so called) which are set by men as political superiors, or by men, as private persons, in pursuance of legal rights.

115. The third comprises laws of the two following species :  
1. The laws (properly so called) which are set by men to men but not by men as political superiors, nor by men, as private persons, in pursuance of legal rights : 2. The laws, which are closely analogous to laws proper, but are merely opinions or sentiments held or felt by men in regard to human conduct.—I put laws of these species into a common class, and I mark them with the common name of positive morality or positive moral rules.

116. My reasons for using the two expressions '*positive law*' and '*positive morality*,' are the following:—

117. There are two capital classes of human laws. The first comprises the laws (properly so called) which are set by men as political superiors, or by men, as private persons, in pursuance of legal rights. The second comprises the laws (proper and improper) which belong to the two species above mentioned.

118. As merely distinguished from the second, the first of those capital classes might be named simply *law*. As merely distinguished from the first, the second of those capital classes might be named simply *morality*. But both must be distinguished from the law of God: and, for the

Distribu-  
tion of  
laws pro-  
per, and  
laws by  
analogy,  
under  
three  
capital  
classes.

The ex-  
pressions  
*positive  
law* and  
*positive  
morality*.



purpose of distinguishing both from the law of God, we must qualify the names *law* and *morality*. Accordingly, I style the first of those capital classes 'positive law:' and I style the second of those capital classes 'positive morality.' By the common epithet *positive*, I denote that both classes flow from human sources. By the distinctive names *law* and *morality*, I denote the difference between the human sources from which the two classes respectively emanate.

119. Strictly speaking, every law properly so called is a positive law. For it is put or set by its individual or collective author, or it exists by the position or institution of its individual or collective author.

120. But, as opposed to the law of nature (meaning the law of God), human law of the first of those capital classes is styled by writers on jurisprudence 'positive law.' This application of the expression 'positive law' was manifestly made for the purpose of obviating confusion; confusion of human law of the first of those capital classes with that Divine law which is the measure or test of human.

121. And, in order to obviate similar confusion, I apply the expression 'positive morality' to human law of the second capital class. For the name *morality*, when standing unqualified or alone, may signify the law set by God, or human law of that second capital class. If you say that an act or omission violates morality, you speak ambiguously. You may mean that it violates the law which I style 'positive morality,' or that it violates the Divine law which is the measure or test of the former.\*

121. Professor Clark, in discussing Austin's use of the three expressions, proper, positive, and strictly so called, writes, "*Proper* signifies that the law emanates from a determinate author; *positive* that such author is human; *strictly so called*, that the human author is sovereign."<sup>1</sup> The statement is scarcely justified

<sup>1</sup> "Practical Jurisprudence," p. 136.

122. From the expression *positive law* and the expression *positive morality*, I pass to certain expressions with which they are closely connected.

123. The science of jurisprudence (or, simply and briefly, jurisprudence) is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness.

124. Positive morality, as considered without regard to its goodness or badness, *might* be the subject of a science closely analogous to jurisprudence. I say '*might* be:' since it is only in one of its branches (namely, the law of nations or international law) that positive morality, as considered without regard to its goodness or badness, has been treated by writers in a scientific or systematic manner.—For the science of positive morality, as considered without regard to its goodness or badness, current or established language will hardly afford us a name. The name *morals*, or *science of morals*, would denote it ambiguously: the name *morals*, or *science of morals*, being commonly applied (as I shall show immediately) to a department of ethics or deontology. But, since the science of jurisprudence is not unfrequently styled 'the science of positive law,' the science in question might be styled analogically 'the science of positive morality.' The department of the science in question which relates to international law, has actually been styled by Von Martens, a recent writer of celebrity, 'positives oder praktisches Völkerrecht:' that is to say, 'positive international law,' or 'practical international law.' Had he named that department of the science 'positive international moral-

Explanation of the following expressions: viz., science of jurisprudence and science of positive morality; science of ethics or deontology, science of legislation, and science of morals.

by Austin's language. *Proper* undoubtedly indicates that the law has a determinate author. *Positive*, on the other hand, although it always means human, carries the further implication of political when used with law simply. *Positive Law* and *Law strictly so called* are identical expressions.

ity,' the name would have hit its import with perfect precision.\*

125. The science of ethics (or, in the language of Mr. Bentham, the science of deontology) may be defined in the following manner.—It affects to determine the test of positive law and morality. In other words, it affects to expound them as they should be; as they would be if they were good or worthy of praise; or as they would be if they conformed to an assumed measure.

126. The science of ethics (or, simply and briefly, ethics) consists of two departments: one relating specially to positive law, the other relating specially to positive morality. The department which relates specially to positive law is commonly styled *the science of legislation*, or, briefly, *legislation*. The department which relates specially to positive morality, is commonly styled *the science of morals*, or, briefly, *morals*.

Meaning  
of the epi-  
thet *good*  
or *bad* as  
applied to  
a human  
law.

127. The foregoing attempt to define the science of ethics naturally leads me to offer the following explanatory remark. When we say that a human law is good or bad, or is what it ought to be or what it ought not to be, we mean (unless we intimate our mere liking or aversion) that the law agrees with or differs from a something to which we

124. As will be seen later, Austin defines Jurisprudence as the science of the notions, principles, and distinctions common to various legal systems. The heterogeneous nature of the elements grouped by Austin as positive morality precludes the possibility of a corresponding science in that subject. But portions might be so treated. Austin quotes the case of International Law. Conceivably, there might also be a science having for its object the statement of the unitives which underlie the popular moralities of civilized nations. Attempts have been made by various authors to apply a similar method in Theology, and to derive a science of Religion from the study and comparison of different religious systems; by some such process of comparative analysis Seeley arrived at his definition of Religion as habitual admiration. The value of comparative methods in Jurisprudence is discussed in Excursus F.

tacitly refer it as to a measure or test. For example, to the adherent of the theory of utility, a human law is good if it be generally useful, and a human law is bad if it be generally pernicious. For, in *his* opinion, it is consonant or not with the law of God, inasmuch as it is consonant or not with the principle of general utility. To the adherent of the hypothesis of a moral sense, a human law is good if he likes it he knows not why, and a human law is bad if he hates it he knows not wherefore. For, in *his* opinion, that his inexplicable feeling of liking or aversion shows that the human law pleases or offends the Deity.

128. To the atheist a human law is good if it be generally useful, and a human law is bad if it be generally pernicious. For the principle of general utility would serve as a measure or test, although it were not an index to an ulterior measure or test. But if he call the law a good one without believing it useful, or if he call the law a bad one without believing it pernicious, the atheist simply intimates his mere liking or aversion. For, unless it be thought an index to the law set by the Deity, an inexplicable feeling of approbation or disapprobation can hardly be considered a measure or test. And, in the opinion of the atheist, there is no law of God which his inexplicable feeling can point at.

129. To the believer in a supposed revelation, a human law is good or bad as it agrees with or differs from the terms wherein the revelation is expressed.

130. In short, the goodness or badness of a human law is a phrase of relative and varying import. A law which is good to one man is bad to another, in case they tacitly refer it to different and adverse tests.

131. The Divine laws may be styled good, in the sense Meaning of the opi-  
that good  
as applied  
to the law  
of God. in which the atheist may apply the epithet to human. We may style them good, or worthy of praise, inasmuch as they agree with utility considered as an ultimate test. And

this is the only meaning with which we can apply the epithet to the laws of God. Unless we refer them to utility considered as an ultimate test, we have no test by which we can try them. To say that they are good because they are set by the Deity, is to say that they are good as measured or tried by themselves. But to say this is to talk absurdly: for every object which is measured, or every object which is brought to a test, is compared with a given object other than itself.—If the laws set by the Deity were not generally useful, or if they did not promote the general happiness of his creatures, or if their great Author were not wise and benevolent, they would not be good or worthy of praise, but were devilish and worthy of execration.\*

Positive  
laws, in  
their rela-  
tions.

132. Positive laws, the appropriate matter of jurisprudence, are related in the way of resemblance, or by a close

131. Q. Is the language of this section consistent (1) with Austin's general analysis of law? (2) with popular theology? (Are the divine commands held to be binding because commanded, or because they are presumed to promote certain ends?)

*Note.*—The language of § 131 is interesting and significant. It suggests that Austin regarded moral rules as binding, not because they are divinely commanded, but because they tend to promote human happiness; if they chance to be divinely commanded, so much the better. Emerson has remarked that the Englishman would not tolerate a Providence that thought light of a pound sterling. Austin would not tolerate a God who slighted utility. But in taking up this attitude he bears witness to the possibility of another conception of law than that of command. Great scholastic controversies have turned on the question whether law is primarily and essentially the dictate of right reason or is the expression of a sovereign will. Austin's reference to a non-utilitarian Deity recalls a passage from Dr. Gierke: "Mediæval schoolmen had hazarded the saying, usually referred to Grotius, that there would be a Law of Nature, discoverable by human reason and absolutely binding, even if there were no God, or the Deity were unreasonable or unrighteous."<sup>1</sup>

<sup>1</sup> "Political Theories of the Middle Ages," p. 174; cf. *infra* Excursus E; "The Conception of Law as Command."

or remote analogy, to the following objects.—1. In the way of resemblance, they are related to the laws of God. 2. In the way of resemblance, they are related to those rules of positive morality which are laws properly so called. 3. By a close or strong analogy, they are related to those rules of positive morality which are merely opinions or sentiments held or felt by men in regard to human conduct. 4. By a remote or slender analogy, they are related to laws merely metaphorical, or laws merely figurative.

133. To distinguish positive laws from the objects now enumerated, is the purpose of the present attempt to determine the province of jurisprudence. Purpose of the present course.

134. In my present lecture, I shall examine or discuss especially the following principal topics: namely, the distinguishing marks of those positive moral rules which are laws properly so called: the distinguishing marks of those positive moral rules which are styled *laws* or *rules* by an analogical extension of the term: the distinguishing marks of the laws which are styled *laws* by a metaphor. Of the present lecture.

135. I shall complete, in my next lecture, the purpose mentioned above, by explaining the marks or characters which distinguish positive laws, or laws strictly so called: an explanation involving an analysis of the capital expression *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*. For the essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be stated thus. Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author. Of the ensuing lecture.

136. Having shown the connection of my present discourse with foregoing and following lectures, I proceed to examine or discuss its appropriate topics or subjects.

The essentials of a law properly so called, together with certain consequences.

137. In my first lecture, I endeavoured to resolve a law (taken with the largest signification which can be given to the term properly) into the necessary or essential elements of which it is composed. Now those essentials of a law proper, together with certain consequences which those essentials import, may be stated briefly in the following manner.—1. Laws properly so called are a species of *commands*. But, being a *command*, every law properly so called flows from a *determinate* source, or emanates from a *determinate* author. In other words, the author from whom it proceeds is a determinate rational being, or a determinate body or aggregate of rational beings. For whenever a command is expressed or intimated, one party signifies a wish that another shall do or forbear: and the latter is obnoxious to an evil which the former intends to inflict in case the wish be disregarded. But every signification of a wish made by a single individual, or made by a body of individuals *as a body or collective whole*, supposes that the individual or body is certain or determinate. And every intention or purpose held by a single individual, or held by a body of individuals *as a body or collective whole*, involves the same supposition. 2. Every sanction properly so called is an eventual evil annexed to a command. Any eventual evil may operate as a motive to conduct: but unless the conduct be commanded and the evil be annexed to the command purposely to enforce obedience, the evil is not a sanction in the proper acceptance of the term. 3. Every duty properly so called supposes a command by which it is created.

The laws of God, and positive laws, are

138. Now it follows from these premises, that the laws of God, and positive laws, are laws proper, or laws properly so called. The laws of God are laws proper, inasmuch as they

are commands express or tacit, and therefore emanate from laws properly so called, a certain source. Positive laws, or laws strictly so called, are established directly or immediately by authors of three kinds:—by monarchs, or sovereign bodies, as supreme political superiors: by men in a state of subjection, as subordinate political superiors: by subjects, as private persons, in pursuance of legal rights. But every positive law, or every law strictly so called, is a direct or circuitous command of a monarch or sovereign number in the character of political superior: that is to say, a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author. And being a command (and therefore flowing from a determinate source), every positive law is a law proper or a law properly so called.

139. Besides the human laws which I style positive law, there are human laws which I style positive morality, rules of positive morality, or positive moral rules. The generic character of laws of the class may be stated briefly in the following negative manner. No law belonging to the class is a direct or circuitous command of a monarch or sovereign number in the character of political superior.

140. But of positive moral rules, some are laws proper, or laws properly so called: others are laws improper, or laws improperly so called.

141. The positive moral rules which are laws properly so called, are distinguished from other laws by the union of two marks.—1. They are imperative laws or rules set by men to men. 2. They are not set by men as political superiors, nor are they set by men as private persons, in pursuance of legal rights. Inasmuch as they bear the latter of these two marks, they are not commands of sovereigns in the character of political superiors. Consequently, they are not positive laws: they are not clothed with legal sanctions, nor do they oblige legally the persons to whom

laws properly so called.

The generic character of positive moral rules.

Of positive moral rules, some are laws proper, but others are laws improper.

The positive moral rules which are laws properly so called, are commands.



they are set. But being commands (and therefore being established by determinate individuals or bodies), they are laws properly so called: they are armed with sanctions, and impose duties, in the proper acceptation of the terms.

142. Of positive moral rules which are laws properly so called, some are established by men who are not subjects, or are not in a state of subjection to a monarch or sovereign number. Of these some are established by men living in the negative state which is styled a state of nature or a state of anarchy: that is to say, by men who are *not* members, sovereign or subject, of any political society: others are established by sovereign individuals or bodies, but not in the character of political superiors.

143. Of laws properly so called which are set by subjects, some are set by subjects as subordinate political superiors; others are set by subjects as private persons: Meaning by 'private persons,' subjects not in the class of subordinate political superiors, or subordinate political superiors not considered as such.—Laws set by subjects as subordinate political superiors, are positive laws: they are clothed with legal sanctions, and impose legal duties. They are set by sovereigns or states in the character of political superiors, although they are set by sovereigns circuitously or remotely. Although they are made directly by subject or subordinate authors, they are made through legal rights granted by sovereigns or states, and held by those subject authors as mere trustees for the granters. Of laws set by subjects as private persons, some are not established by sovereign or supreme authority. And these are rules of positive morality: they are not clothed with legal sanctions, nor do they oblige legally the parties to whom they are set.—But of laws set by subjects as private persons, others are set or established in pursuance of legal rights residing in the subject authors. And these are positive laws or laws strictly so called.

Although they are made directly by subject authors, they are made in pursuance of rights granted or conferred by sovereigns in the character of political superiors: they legally oblige the parties to whom they are set, or are clothed with legal sanctions. They are commands of sovereigns as political superiors, although they are set by sovereigns circuitously or remotely.

144. A law set by a subject as a private person, but in pursuance of a legal right residing in the subject author, is either a positive law purely or simply, or it is a positive law as viewed from one aspect, and a rule of positive morality as viewed from another. The person who makes the law in pursuance of the legal right, is either legally bound to make the law, or he is not. In the first case, the law is a positive law purely or simply. In the second case, the law is compounded of a positive law and a positive moral rule.

Laws set by men, as private persons, in pursuance of legal rights.

145. For example, A guardian may have a right over his pupil or ward, which he is legally bound to exercise, for the benefit of the pupil or ward, in a given or specified manner. Now if, in pursuance of his right, and agreeably to his duty or trust, he sets a law or rule to the pupil or ward, the law is a positive law purely or simply. It is properly a law which the state sets to the ward through its minister or instrument the guardian. It is not made by the guardian of his own spontaneous movement, or is made in pursuance of a duty which the state has imposed upon him. The position of the guardian is closely analogous to the position of subordinate political superiors; who hold their delegated powers of direct or judicial legislation as mere trustees for the sovereign granters.

146. Again: the master has legal rights, over or against his slave, which are conferred by the state upon the master for his own benefit. And, since they are conferred upon him for his own benefit, he is not legally bound to exercise or use

them. Now if, in pursuance of these rights, he sets a law to his slave, the law is compounded of a positive law and a positive moral rule. Being made by sovereign authority, and clothed by the sovereign with sanctions, the law made by the master is properly a positive law. But, since it is made by the master of his own spontaneous movement, or is not made by the master in pursuance of a legal duty, it is properly a rule of positive morality, as well as a positive law. Though the law set by the master is set circuitously by the sovereign, it is set or established by the sovereign at the pleasure of the subject author. The master is not the instrument of the sovereign or state, but the sovereign or state is rather the instrument of the master.

147. Laws which are positive law as viewed from one aspect, but which are positive morality as viewed from another, I place simply or absolutely in the first of those capital classes. If, affecting exquisite precision, I placed them in each of those classes, I could hardly indicate the boundary by which those classes are severed without resorting to expressions of repulsive complexity and length.

Classifica-  
tion of  
positive  
moral  
rules  
which are  
laws  
proper.

148. It appears from the foregoing distinctions, that positive moral rules which are laws properly so called are of three kinds.—1. Those which are set by men living in a state of nature. 2. Those which are set by sovereigns, but not by sovereigns as political superiors. 3. Those which are set by subjects as private persons, and are not set by the subject authors in pursuance of legal rights.

Examples.

149. To cite an example of rules of the first kind were superfluous labour. A man living in a state of nature may impose an imperative law: though, since the man *is* in a state of nature, he cannot impose the law in the character of sovereign, and cannot impose the law in pursuance of a legal right. And the law being *imperative* (and therefore proceeding from a *determinate* source) is a law properly so called:

though, for want of a sovereign author proximate or remote, it is not a positive law but a rule of positive morality.

150. An imperative law set by a sovereign to a sovereign, or by one supreme government to another supreme government, is an example of rules of the second kind. Since no supreme government is in a state of subjection to another, an imperative law set by a sovereign to a sovereign is not set by its author in the character of political superior. Nor is it set by its author in pursuance of a legal right: for every legal right is conferred by a supreme government, and is conferred on a person or persons in a state of subjection to the granter. Consequently, an imperative law set by a sovereign to a sovereign is not a positive law or a law strictly so called. But being imperative (and therefore proceeding from a determinate source), it amounts to a law in the proper signification of the term, although it is purely or simply a rule of positive morality.

151. If they be set by subjects as private persons, and not in pursuance of legal rights, the laws following are examples of rules of the third kind: namely, imperative laws set by parents to children; imperative laws set by masters to servants; imperative laws set by lenders to borrowers; imperative laws set by patrons to parasites. Being imperative (and therefore proceeding from determinate sources), the laws foregoing are laws properly so called: though, if they be set by subjects as private persons, and be not set by their authors in pursuance of legal rights, they are not positive laws but rules of positive morality.

152. Again: a club or society of men, signifying its collective pleasure by a vote of its assembled members, passes or makes a law to be kept by its members severally under pain of exclusion from its meetings. Now if it be made by subjects as private persons, and be not made by its authors in pursuance of a legal right, the law voted

and passed by the assembled members of the club is a further example of rules of the third kind.\*

152. Q. (1) Austin divides commands set by subjects into four classes:—

- (a) Those set by subjects as political subordinates.
- (b) Those set by subjects as private persons in pursuance of legal rights, but not as subject to a legal duty;
- (c) Those set by subjects as private persons in pursuance of legal rights, and also as subject to a duty.
- (d) Those set by subjects as private persons and not in pursuance of legal right.

Suggest concrete examples of these different classes.

- (2) Which of the above-mentioned classes are positive laws?
- (3) Into which of the classes should the following be placed:
  - (i) The order of a guardian to his ward
    - (a) to marry X,
    - (b) not to marry Y,
    - (c) to abstain from smoking,
    - (d) to take lessons in music.
  - (ii) The command of a husband to his wife not to contract debts in his name.
  - (iii) A resolution of a boating club increasing
    - (a) the entrance fee
    - (b) the annual subscription.

*Note.—Autonomic Laws.*—In the complete edition of his Lectures, Austin says: "Another species of law not made by the supreme legislature are laws (if such they can be called) which are established by private persons, and to which the supreme legislature lends its sanction. These (in truth) are nothing but obligations imposed by virtue of rights which the legislator has conferred. For example, by my will, I may impose certain conditions on my devisees or legatees. By virtue of a contract, the contracting parties impose upon one another certain obligations."<sup>1</sup> This language should be carefully compared with sections 144–7, which appear as a note in the complete edition and raise several difficulties. Private persons are said to impose rules in pursuance of legal rights. These rules are said to be positive laws. But no adequate guidance is suggested for determining the precise conditions under which a rule may be said to be set in pursuance of a legal right. Had this difficulty been duly considered by Austin, he would not have failed to recognize that a legal right to set rules of conduct must be carefully distinguished from a legal right to set positive laws.

<sup>1</sup> II, 524.

153. The positive moral rules which are laws improperly so called, are *laws set or imposed by general opinion*: that is

The positive moral rules

Many general commands of subjects to subjects, though set in pursuance of a legal right and directly or indirectly enforced by the State, establish no new law, but only bring into operation some existing law. Austin appears to be conscious of the fact in the second volume of his work, but to have overlooked it in his first volume. X enters into a contract with Y, and subsequently gives to Y an order within a reasonable interpretation of the original contract. A rule of conduct is imposed on Y; if Y refuses to observe this rule he may be sued for a breach of contract. In such a case there is of course no new law; the real law applicable to the case is the very important one that agreements which fulfil certain conditions shall bind the parties. Again, Austin speaks of the commands of a guardian to his ward as positive laws, but it is not easy to find examples which justify this statement. In the case of *Hall v. Hall*, an application was made to compel a boy of fifteen to return to Eton, where he had been placed by his guardian. Lord Chancellor Hardwicke said that the guardian was the proper judge of the school to which the youth was to be sent, that the school was of very great reputation, and that if he refused to go he would be compelled. The Lord Chancellor quoted an instance in Lord Macclesfield's time of an undergraduate who, on the application of his guardian, was sent back to Cambridge in the custody of Lord Macclesfield's tipstaff.<sup>1</sup> This is very far from saying that a general command of a guardian, in fulfilment of his responsibilities as guardian, is a positive law. Where the State enforces a command of the guardian, it does so merely in fulfilment of the general law that a ward shall render reasonable obedience.

which are laws improperly so called.

On the other hand, if B, for his own amusement, touches the alarm signal of a railway train when half-way between two stations, he breaks a by-law of the railway company and becomes liable to a fine of £5. It is clear that a positive law has been set to individuals by an authority which legislates in virtue of a delegation from the sovereign power. A very obvious difference exists between this case and that of a guardian ordering his ward to rise each morning at a certain hour. In the case of the railway by-law, a power of imposing rules and of attaching to them a definite sanction is expressly granted by the State. The State will enforce the sanction through the courts; whereas, in the case of the guardian and ward, the State will uphold generally the authority of the guardian without necessarily taking

<sup>1</sup> 3 Atk. 721.

to say, by the general opinion of any class or any society of persons. For example, some are set or imposed by the

into consideration any particular sanction which the guardian may have attached to his command.

The case of club rules, referred to by Austin, also deserves consideration. A man who joins a social club brings himself within the operation of its rules, including the rule as to payment of subscription. He may be sued for the subscription. If he violates the general rules, he may be expelled from the club. His expulsion, if carried out in a proper and formal manner, will be upheld by the courts. According to the constitution of most clubs, a member is bound by new rules which have been passed by the majority in opposition to his wishes. He may be compelled to observe these new rules under penalty of expulsion. On a superficial view, the club may seem to be a number of private persons who set positive laws in pursuance of a legal right. Rules of conduct are imposed, and somewhere or other behind them is the force of the State. On a second view of the matter, however, I think it will be clear that the court does not enforce club rules as such, but only as being the terms of a contract. "The plaintiff," said Vice-Chancellor Bacon, in a leading case on club law, "has made the law for himself, in this case, by becoming a member, and thereby submitting to the rules, and he must be bound by it. . . . The case is governed by a written agreement to which the plaintiff has given his assent, and I base my decision on the clear-written contract between the parties."<sup>1</sup> Where the constitution of a club does not provide for the revision of the rules, a new rule requires the assent of *all* the members.<sup>2</sup>

Apart from the objection just considered, that many general commands, though enforced by the State, merely bring some existing law into operation, difficulties of another kind arise in connection with the distinction between legislative and executive functions. As Professor Gray remarks, if jurisprudence, defined as the science of the commands of the sovereign, is to be extended to include judge-made law, it ought to be extended to include colonel-made and postmaster-made law. Jurisprudence, he urges, should include those commands of the sovereign, the main object of which is to define and enforce rights, as opposed to furnishing machinery for other ends, e.g. building of roads, distribution of letters, and the maintenance of army discipline.<sup>3</sup> The difficulty which exists with regard to such cases is discussed

<sup>1</sup> *Lyttelton v. Blackburne*, 45 L. J. Ch. 223.

<sup>2</sup> *Dawkins v. Antrobus*, 17 Ch. D. 620.

<sup>3</sup> "Harvard Law Review," April, 1892, p. 25.

general opinion of persons who are members of a profession or calling: others, by that of persons who inhabit a town or province: others, by that of a nation or independent political society: others, by that of a larger society formed of various nations.

154. A few species of the laws which are set by general opinion have received appropriate names.—For example, There are laws or rules imposed upon gentlemen by opinions current amongst gentlemen. And these are usually styled *the rules of honour*, or *the laws or law of honour*.—There are

by Mr. Frederic Harrison. As this learned critic remarks, it is necessary to distinguish the sanctions of administrative and executive discipline from the sanctions of the law courts. "He [Austin] should have pointed out the difference between the rules enforced by the courts, which are laws, and rules enforced by executive powers, which are regulations with which the lawyer has nothing to do."<sup>1</sup> The difficulty is more easy to illustrate than surmount. Some writers appear to assume that generality is a sufficient test of the distinction between legislative and administrative action. Thus Hearn remarks that the order of a general to his soldiers is not a law, because not framed "with intent to establish a rule of conduct."<sup>2</sup> Obviously, such an order *might* be designed expressly to establish a rule of conduct.

By whatever precise test we distinguish such rules, the important fact is that they must be distinguished. Positive Law as the subject-matter of Jurisprudence ought not to be held to include any of the following classes:—

- (a) The particular commands of political superiors.
- (b) The general commands of private individuals which merely bring some existing law into operation.
- (c) The general commands of executive discipline, with the enforcement of which the courts are not directly concerned.

Differences of opinion are certain to arise with respect to the precise definition of each of these classes. It is probably sufficient for the student of Jurisprudence to recognize their general character, and to remember that they do not properly come within the sphere of his science.<sup>3</sup>

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<sup>1</sup> "Fortnightly Review," pp. 24, 689.

<sup>2</sup> "Legal Duties and Rights," p. 9.

<sup>3</sup> Cf. *infra* note on § 289.



laws or rules imposed upon people of fashion by opinions current in the fashionable world. And these are usually styled *the law set by fashion*.—There are laws which regard the conduct of independent political societies in their various relations to one another: Or, rather, there are laws which regard the conduct of sovereigns or supreme governments in their various relations to one another. And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled *international law*.

A law set by general opinion, is merely the opinion of an indeterminate body of persons in regard to a kind of conduct.

155. Now a law set or imposed by general opinion is a law improperly so called. It is styled a *law* or *rule* by an analogical extension of the term. When we speak of a law set by general opinion, we denote, by that expression, the following fact.—Some intermediate body or uncertain aggregate of persons regards a kind of conduct with a sentiment of aversion or liking. In consequence of that sentiment or opinion, it is likely that they or some of them will be displeased with a party who shall pursue or not pursue conduct of that kind. And, in consequence of that displeasure, it is likely that *some* party (*what* party being undetermined) will visit the party provoking it with some evil or another.

156. The body by whose opinion the law is said to be set, does not command, expressly or tacitly, that conduct of the given kind shall be forborne or pursued. For, since it is not a body precisely determined or certain, it cannot, *as a body*, express or intimate a wish. As a body, it cannot signify a wish by oral or written words, or by positive or negative deportment. The so-called law or rule which its opinion is said to impose, is merely the sentiment which it feels, or the opinion which it holds, in regard to a kind of conduct.

157. A determinate member of the body, who opines or feels with the body, may doubtless be moved or impelled, by that very opinion or sentiment, to command that conduct of

the kind shall be forborne or pursued. But the command expressed or intimated by that determinate party is not a law or rule imposed by general opinion. It is a law properly so called, set by a determinate author.—For example, The so-called law of nations consists of opinions or sentiments current among nations generally. It therefore is not law properly so called. But one supreme government may doubtless command another to forbear from a kind of conduct which the law of nations condemns. And, though it is fashioned on law which is law improperly so called, this command is a law in the proper signification of the term. Speaking precisely, the command is a rule of positive morality set by a determinate author. For, as no supreme government is in a state of subjection to another, the government commanding does not command in its character of political superior. If the government receiving the command were in a state of subjection to the other, the command, though fashioned on the law of nations, would amount to a positive law.\*

157. *International Law.* The propriety of describing International Law as morality has been severely criticized by many writers.<sup>1</sup> Austin, in view of his recognition of a fundamental distinction between a definitely organized society with determinate organs for making and enforcing law, and a society which lacks such organs, naturally held Positive Law and International Law to belong to different categories. To do justice to his position we must remember that he denies neither the analogy between International and Positive Law nor the existence and practical efficiency of international penalties.

Professor Westlake, on the other hand, holds that we ought not to make the classification of law depend on a verbal definition as if it were an exact science, but should follow the practice approved

<sup>1</sup> Cf. Clark, "Practical Jurisprudence," pp. 184-95; Lawrence, "Essays on Modern International Law," pp. 1-40; Walker, "The Science of International Law," pp. 1-40; Ihering, "L'Evolution du Droit," 217-19; "L'Esprit du Droit romain," t. I, § 11; Holland, "Jurisprudence," 9th ed., p. 125; Willoughby, "Nature of the State," pp. 198-200.

158. The foregoing description of a law set by general opinion imports the following consequences:—that the party who will enforce it against any future transgressor is never determinate and assignable. The party who actually en-

in natural history, where the classifications are founded on likeness to types. The leading idea which determines the use of the English word *law*, he contends, is enforcement through action, regular or irregular, of a society. Rules of International Law he regards as rules approved by the general opinion of an international society, not as expressing conduct to be recommended without being enforced, like telling the truth or being charitable, but as expressing conduct to be enforced by such means as exist. States do not act upon the rules as freely choosing to do so in each instance, but obey them from a persuasion that the rules are law. This mental attitude towards the rules is considered by the learned author a sufficient justification for calling them law.<sup>1</sup>

If one may venture to hold an opinion where the prophets differ, I should incline to agree with the conclusion, if not with all the arguments, of Professor Westlake. As a matter of fact, the term International Law is at present too generally adopted to admit of questioning its propriety. But apart from this, the severest accusation that can be urged against the term is simply that it is a trifle previous. Just as in the history of particular societies there are periods when the differentiation between law and morality is in the process of becoming rather than actually realized—periods when a something which is to become positive law is being slowly differentiated from positive morality—so in relation to the society of nations to-day there is a body of rules in which a distinction is being established and developed between rules which must be obeyed, if certain penalties are not to be incurred, and rules which are merely the expression of international comity and goodwill. Rules of the former class, by virtue both of the popular conception of their obligatory character, and of the type of organization implied in their formulation and interpretation, are more nearly allied to positive law than to positive morality, and are therefore less inaccurately described as International Law than as International Morality. They are law in becoming—law struggling for existence, struggling to make itself good in contradistinction from International Morality, and, like the customary law of undeveloped societies, entitled to be called law in virtue of

<sup>1</sup> "International Law," I, pp. 6-7.

forces it against an actual transgressor is of necessity certain. But that certain party is not the executor of a command proceeding from the uncertain body. He has not been authorized by that uncertain body to enforce that so-called law which its opinion is said to establish. He is not in the position of a minister of justice appointed by the sovereign or state to execute commands which it issues. He harms the actual offender against the so-called law or (to speak in analogical language) he applies the sanction annexed to it, of his own spontaneous movement. Consequently, though a party who actually enforces it is, of necessity, certain, the party who will enforce it against any future offender is never determinate and assignable.

159. It follows from the foregoing reasons, that a so-called law set by general opinion is not a law in the proper signification of the term. It also follows from the same reasons, that it is not armed with a sanction, and does not impose a duty, in the proper acceptance of the expressions. For a sanction, properly so called, is an evil annexed to a command. And duty properly so called is an obnoxiousness to evils of the kind. But a so-called law set by general opinion is closely analogous to a law in the proper signification of the term. And, by consequence, the so-called sanction with which the former is armed, and the so-called duty which the former imposes, are closely analogous to a sanction and a duty in the proper acceptance of the expressions.

A brief statement of the analogy between a law proper and a law set by general opinion.

160. The analogy between a law in the proper signification of the term and a law set by general opinion, lies in their likeness to law strictly so called—the Positive Law, which is the subject-matter of Jurisprudence.

The conditions under which municipal courts will enforce rules of International Law are considered in Excursus C. In the present note, I have discussed the status of International rule apart from such enforcement.

159. That obedience to laws set by opinion is encouraged by rewards as well as by penalties is a further and important difference between this class and laws strictly so called. Sidgwick,

fication of the term and a so-called law set by general opinion, may be stated briefly in the following manner.—

1. In the case of a law properly so called, the determinate individual or body by whom the law is established wishes that conduct of a kind shall be forborne or pursued. In the case of a law imposed by general opinion, a wish that conduct of a kind shall be forborne or pursued is felt by the uncertain body whose general opinion imposes it. 2. If a party obliged by the law proper shall not comply with the wish of the determinate individual or body, he probably will suffer, in consequence of his not complying, the evil or inconvenience annexed to the law as a sanction. If a party obnoxious to their displeasure shall not comply with the wish of the uncertain body of persons, he probably will suffer, in consequence of his not complying, some evil or inconvenience from some party or another. 3. By the sanction annexed to the law proper, the parties obliged are inclined to act or forbear agreeably to its injunctions or prohibitions. By the evil which probably will follow the displeasure of the uncertain body, the parties obnoxious are inclined to act or forbear agreeably to the sentiment or opinion which is styled analogically a law. 4. In consequence of the law properly so called, the conduct of the parties obliged has a steadiness, constancy, or uniformity, which, without the existence of the law, their conduct

in discussing the relations of the two classes, remarks: "Positive Law and Positive Morality may be distinguished by their respective sanctions. But they also differ importantly, regarded merely as intelligible systems; since in the former case doubts as to what is law may be authoritatively removed by judicial interpretation, and divergences between what *is* and what *ought* to be law may be removed by legislation. But with morality it is otherwise; hence there is much greater conflict, vagueness, and uncertainty in the established moral code than in the established law."<sup>1</sup>

<sup>1</sup> "Elements of Politics," 1st ed., pp. 191-7.

would probably want. In consequence of the sentiment or opinion which is styled analogically a law, the conduct of the parties obnoxious has a steadiness, constancy, or uniformity, which, without the existence of that sentiment in the uncertain body of persons, their conduct would hardly present.\*

161. In the foregoing analysis of a law set by general opinion, the meaning of the expression '*indeterminate* body of persons' is indicated rather than explained. To complete my analysis of a law set by general opinion, I will here insert a concise exposition of the following pregnant distinction: namely, the distinction between a determinate and an indeterminate body of single or individual persons.

Distinction between *determinate*, and *indeterminate*.

162. I will first describe the distinction in general or abstract terms, and will then exemplify and illustrate the general or abstract description.

163. If a body of persons be determinate, *all* the persons who compose it are determined and assignable.

164. But determinate bodies are of two kinds. Either, 1. The body is composed of persons determined specifically or individually. Or, 2. It is composed of *all* the persons who belong to a given class, or who belong respectively to two or more of such classes.

165. If a body be indeterminate, *all* the persons who compose it are not determined and assignable. Or (changing the expression) *every* person who belongs to it is not determined, and, therefore, cannot be indicated.—For an indeterminate body consists of *some* of the persons who belong to another and larger aggregate. But how many of those persons are members of the indeterminate body, or

160. Q. Admitting that in the expression *laws of honour*, the term law is used analogically, are we also compelled to admit that in the expression *rules of honour* the term rule is used analogically?

which of those persons in particular are members of the indeterminate body, is not and cannot be known completely and exactly.

166. For example, the trading firm or partnership of A B and C is a determinate body of the kind first described above. Every member of the firm is determined specifically, or by a character or description peculiar or appropriate to himself. And every member of the firm belongs to the determinate body, not by reason of his answering to any generic description, but by reason of his bearing his specific or appropriate character. It is as being that very individual person that A B or C is a limb of the partnership.

167. The British Parliament for the time being, is a determinate body of the second kind above described. It comprises the only person who answers for the time being to the generic description of king. It comprises every person belonging to the class of peers who are entitled for the time being to vote in the upper house. It comprises every person belonging to the class of commoners who for the time being represent the commons in parliament. And, though every member of the British Parliament is of necessity determined by a specific or appropriate character, he is not a member of the parliament by reason of his bearing that character, but by reason of his answering to the given generic description. It is not as being the individual George, but as being the individual who answers to the generic description of king, that George is king of Britain and Ireland, and a limb of the determinate body which is sovereign or supreme therein. It is not as being the individual Grey, or as being the individual Peel, that Grey is a member of the upper house, or Peel a member of the lower. Grey is a member of the upper house, as belonging to the class of peers entitled to vote therein. Peel is a member of the lower house, as answer-

ing the generic description 'representative of the commons in parliament.'

168. To exemplify the foregoing description of an indeterminate body, I will revert to the nature of a law set by general opinion. Where a so-called law is set by general opinion, most of the persons who belong to a determinate body or class opine or feel alike in regard to a kind of conduct. But the number of that majority, or the several individuals who compose it, cannot be fixed or assigned with perfect fulness or accuracy. For example, A law set or imposed by the general opinion of a nation, by the general opinion of a legislative assembly, by the general opinion of a profession, or by the general opinion of a club, is an opinion or sentiment, relating to conduct of a kind, which is held or felt by most of those who belong to that certain body. But how many of that body, or which of that body in particular, hold or feel that given opinion or sentiment, is not and cannot be known completely and correctly. Consequently, that majority of the certain body forms a body uncertain. Or (changing the expression) the body which is formed by that majority is an indeterminate portion of a determinate body or aggregate.—Generally speaking, therefore, an indeterminate body is an indeterminate portion of a body determinate or certain. But a body or class of persons may also be indeterminate, because it consists of persons of a vague generic character. For example, The body or class of gentlemen consists of individual persons whose generic character of gentleman cannot be described precisely. Whether a given man were a genuine gentleman or not, is a question which different men might answer in different ways.—An indeterminate body may therefore be indeterminate after a twofold manner. It may consist of an uncertain portion of an uncertain body or class.

169. A determinate body of persons is capable of *corporate*



conduct. Whether it consist of persons determined by specific characters, or of persons determined or defined by a character or characters generic, every person who belongs to it is determined and may be indicated. In the first case, every person who belongs to it may be indicated by his specific character. In the second case, every person who belongs to it is also knowable: For every person who answers to the given generic description, or who answers to any of the given generic descriptions, is therefore a member of the body. Consequently, the entire body, or any proportion of its members, is capable, *as a body*, of positive or negative conduct: As, for example, of meeting at determinate times and places; of issuing expressly or tacitly a law or other command; of choosing and deputing representatives to perform its intentions or wishes; of receiving obedience from others, or from any of its own members.

170. An indeterminate body is incapable of corporate conduct, inasmuch as the several persons of whom it consists cannot be known and indicated completely and correctly. In case a portion of its members act or forbear in concert, that given portion of its members is, by that very concert, a determinate or certain body. For example, A law set or imposed by the general opinion of barristers condemns the sordid practice of hugging or caressing attorneys. And as those whose opinion or sentiment sets the so-called law are an indeterminate part of the determinate body of barristers, they form a body uncertain and incapable of corporate conduct. But in case a number or portion of that uncertain body assembled and passed a resolution to check the practice of hugging, that number or portion of that uncertain body would be, by the very act, a certain body or aggregate. It would form a determinate body consisting of the determined individuals who assembled and passed the resolution.—A law imposed by general opinion may be the cause

of a law in the proper acceptation of the term. But the law properly so called, which is the consequent or effect, utterly differs from the so-called law which is the antecedent or cause. The one is an opinion or sentiment of an uncertain body of persons; of a body essentially incapable of joint or corporate conduct. The other is set or established by the positive or negative deportment of a certain individual or aggregate.

171. For the purpose of rendering my exposition as little intricate as possible, I have supposed that a body of persons, forming a body determinate, either consists of persons determined by specific characters, or of persons determined or defined by a generic description or descriptions.—But a body of persons, forming a body determinate, may consist of persons determined by specific or appropriate characters, and also of persons determined by a character or characters generic. Let us suppose, for example, that the individual Oliver Cromwell was sovereign or supreme in England: or that the individual Cromwell, and the individuals Ireton and Fleetwood, formed a triumvirate which was sovereign in that country. Let us suppose, moreover, that Cromwell or the triumvirs convened a House of Commons elected in the ancient manner: and that Cromwell, or the triumvirs yielded a part in the sovereignty to this representative body. Now the sovereign or supreme body formed by Cromwell and the house, or the sovereign and supreme body formed by the triumvirs and the house, would have consisted of a person or persons determined or defined specifically, and of persons determined or defined by a generic character or description. A body of persons, forming a body determinate, may also consist of persons determined or defined specifically, and determined or defined moreover by a character or characters generic. A select committee of a body representing a people or nation, consists of individual

persons named or appointed specifically to sit on that given committee. But those specific individuals could not be members of the committee, unless they answered the generic description 'representative of the people or nation.'

172. It follows from the exposition immediately preceding that the one or the number which is sovereign in an independent political society is a determinate individual person or a determinate body of persons. If the sovereign one or number were not determinate or certain, it could not command expressly or tacitly, and could not be an object of obedience to the subject members of the community.

173. As closely connected with the matter of the exposition immediately preceding, the following remark concerning supreme government may be put commodiously in the present place.—In order that a supreme government may possess much stability, and that the society wherein it is supreme may enjoy much tranquillity, the persons who take the sovereignty in the way of succession, must take or acquire by a given generic mode, or by given generic modes. Or (changing the expression) they must take by reason of their answering to a given generic description, or by reason of their respectively answering to given generic descriptions.—For example, the Roman Emperors or Princes did not succeed to the sovereignty of the Roman Empire or World by a given generic title: by a mode of acquisition given or preordained, and susceptible of generic description. It was neither as lineal descendant of Julius Cæsar or Augustus, nor by the testament or other disposition of the last possessor of the throne, nor by the appointment or nomination of the Roman people or senate, nor by the election of a determinate body formed of the military class, nor by any mode of acquisition generic and preordained, that every successive Emperor, or every successive Prince, acquired the virtual sovereignty of the Roman Empire or

World. Every successive Emperor acquired by a mode of acquisition which was purely anomalous or accidental: which had not been predetermined by any law or custom, or by any positive law or rule of positive morality. Every actual occupant of the Imperial office or dignity (whatever may have been the manner wherein he had gotten possession) was obeyed, for the time, by the bulk of the military class; was acknowledged, of course, by the impotent and trembling senate; and received submission, of course, from the inert and helpless mass which inhabited the city and provinces. By reason of this irregularity in the succession to the virtual sovereignty, the demise of an Emperor was not uncommonly followed by a shorter or longer dissolution of the general supreme government. Since no one could claim to succeed by a given generic title, or as answering for the time being to a given generic description, a contest for the prostrate sovereignty almost inevitably arose between the more influential of the actual military chiefs.\*

173. Q. Discuss the propriety of the expression, *imperative, and therefore proceeding from a determinate source*. Examine the following criticism: "To Austin the statement that a body uncertain as to number cannot act as a body, and cannot, therefore, issue commands, seems so self-evident as to need no further argument. To one surrounded with institutions of a 'popular' character, and accustomed, almost every day, to see government affected and controlled by various agencies of clamour, mass meeting, petition, and newspaper writing, this inability of a body numerically uncertain to express itself, as a body, in ways having the force of command, will, I think, seem less axiomatic."<sup>1</sup>

*Note.*—The author from whom the criticism in the above question is quoted, while objecting to Austin's theory of sovereignty as inhering in a specific number of individuals, admits that Austin is quite right in laying emphasis upon the idea of determinateness, since the idea suggests the existence of definite organs. "Except as sovereignty secures for itself definite and

<sup>1</sup> Professor Dewey, "Political Science Quarterly," March, 1894, pp. 37-8.

Laws set  
by *general*  
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name of  
*laws*.

174. Before I close my analysis of those laws improperly so called which are closely analogous to laws in the proper acceptation of the term, I must advert to a seeming caprice of current language. A law set or imposed by general opinion, is an opinion or sentiment, regarding conduct of a kind, which is held or felt by an indeterminate body: that is to say, an indeterminate portion of a certain or uncertain aggregate. Now a like opinion or sentiment held or felt by an individual, or held or felt *universally* by the members of a body determinate, may be as closely analogous to a law proper as a so-called law set by *general* opinion. It may bear an analogy to a law in the proper acceptation of the term, exactly or nearly resembling the analogy to a law proper which is borne by an opinion or sentiment of an *indeterminate body*. An opinion, for example, of a patron, in regard to conduct of a kind, may be a law or rule to his own dependant or dependants, just as a like opinion of an indeterminate body is a law or rule to all who might suffer by provoking its displeasure. And whether a like opinion be held by an uncertain aggregate, or be held by *every* member of a precisely determined body, its analogy to a law proper is exactly or nearly the same.

175. Deferring to this seeming caprice of current or established language, I have forborne from ranking sentiments of precisely determined parties with the laws improperly so

definable modes of expression, sovereignty is unrealized and inchoate."<sup>1</sup> The remark recalls Ihering's definition of the State as the regulated and assured exercise of social compulsion. It suggests, moreover, the possibility of distinguishing between legal and moral rules by reference to a difference in the degree of organization which may exist for the purposes of their expression, interpretation, and enforcement. The whole question is involved with certain theories of sovereignty which I discuss in *Excursus A and B*.

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<sup>1</sup> *Ibid.*, pp. 51-2.

called which are closely analogous to the proper. Yet with a few slight and obvious changes, my analysis of a law set by *general* opinion will serve as an analysis of a law set by *any* opinion. For between the opinion or sentiment of the indeterminate body, and the opinion or sentiment of the precisely determined party, there is merely the following difference.—The precisely determined party is *capable* of issuing a command in pursuance of the opinion or sentiment. But the uncertain body is not. For, being essentially incapable of joint or corporate conduct, it cannot, as a body, signify a wish or desire, and cannot, as a body, hold an intention or purpose.\*

176. It appears from the expositions in the preceding portion of my discourse, that laws properly so called, with such improper laws as are closely analogous to the proper, are of three capital classes.—1. The law of God. 2. Positive law. 3. Positive morality.

The foregoing distribution of laws briefly recapitulated.

177. It also appears from the same expositions, that positive moral rules are of two species.—1. Those positive moral rules which are express or tacit commands, and which are therefore laws in the proper acceptation of the term. 2. Those laws improperly so called (but closely analogous to laws in the proper acceptation of the term) which are set by general opinion, or are set by opinion: which are set by opinions of uncertain bodies; or by opinions of uncertain bodies, and opinions of determinate parties.

175. Q. (1) What is the precise character of the relation between "the opinions of precisely determined parties" and "the implied commands of a determinate superior"?

(2) Apply Austin's test of the distinction between determinate and indeterminate bodies to the following:—

- (a) The colliers of Wales.
- (b) The lunatics of the United Kingdom.
- (c) Nonconformists.
- (d) Non-Freemasons.

The  
corres-  
ponding  
sanctions,  
duties and  
rights.

178. The sanctions annexed to the laws of God, may be styled *religious*.—The sanctions annexed to positive laws, may be styled, emphatically, *legal*: for the laws to which they are annexed, are styled, simply and emphatically, *laws* or *law*. Or, as every positive law supposes a *πόλις* or *civitas*, or supposes a society political and independent, the epithet *political* may be applied to the sanctions by which such laws are enforced.—Of the sanctions which enforce compliance with positive moral rules, some are sanctions properly so called, and others are styled sanctions by an analogical extension of the term: that is to say, some are annexed to rules which are laws imperative and proper, and others enforce the rule which are laws set by opinion. Since rules of either species may be styled positive morality, the sanctions which enforce compliance with rules of either species may be styled moral sanctions. Or (changing the expression) we may say of rules of either species, that they are sanctioned or enforced morally.

179. The duties imposed by the laws of God may be styled *religious*.—The duties imposed by positive laws, may be styled, emphatically, *legal*.—Of the duties imposed by positive moral rules, some are duties properly so called, and others are styled *duties* by an analogical extension of the term: that is to say, some are creatures of rules which are laws imperative and proper, and others are creatures of the rules which are laws set by opinion. Like the sanctions proper and improper by which they are respectively enforced, these duties proper and improper may be styled *moral*.\*

180. Every right supposes a duty incumbent on a party or parties other than the party entitled. Through the im-

179. Q. X has committed a theft. Is he under a legal duty

(a) to surrender to justice?

(b) to submit to the punishment which the judge imposes?

position of that corresponding duty, the right was conferred. Through the continuance of that corresponding duty, the right continues to exist. If that corresponding duty be the creature of a law imperative, the right is a right properly so called. If that corresponding duty be the creature of a law improper, the right is styled a *right* by an analogical extension of the term. Rights conferred by the law of God, or rights existing through duties imposed by the law of God, may be styled *Divine*.—Rights conferred by positive law, or rights existing through duties imposed by positive law, may be styled, emphatically, *legal*. Or it may be said of rights conferred by positive law, that they are sanctioned or protected *legally*.—The rights proper and improper which are conferred by positive morality, may be styled *moral*. Or it may be said of rights conferred by positive morality, that they are sanctioned or protected *morally*.\*

181. The body of laws which may be styled the law of God, the body of laws which may be styled positive law, and the body of laws which may be styled positive morality, sometimes coincide, sometimes do not coincide, and sometimes conflict.

182. One of these bodies of laws coincides with another, when acts, which are enjoined or forbidden by the former, are also enjoined, or are also forbidden by the latter. For example, The killing which is styled murder is forbidden by the positive law of every political society; it is also forbidden by a so-called law which the general opinion of the society has set or imposed; it is also forbidden by the law of God as known through the principle of utility.

183. One of these bodies of laws does *not* coincide with

180. Austin defines a legal right as follows: "A party has a right, when another or others are bound or obliged by the law, to do or to forbear towards or in regard of him."<sup>1</sup>

<sup>1</sup> "Jurisprudence," I, p. 398.



another, when acts, which are enjoined or forbidden by the former, are not enjoined, or are not forbidden by the latter. For example, Though smuggling is forbidden by positive law, and (speaking generally) is not less pernicious than theft, it is not forbidden by the opinions or sentiments of the ignorant or unreflecting. Where the impost or tax is itself of pernicious tendency, smuggling is hardly forbidden by the opinions or sentiments of any: And it is therefore practised by any without the slightest shame, or without the slightest fear of incurring general censure. Such, for instance, is the case where the impost or tax is laid upon the foreign commodity, not for the useful purpose of raising a public revenue, but for the absurd and mischievous purpose of protecting a domestic manufacture. Offences against the game laws are also in point: for they are not offences against positive morality, although they are forbidden by positive law. A gentleman is not dishonoured, or generally shunned by gentlemen, though he shoots without a qualification. A peasant who wires hares escapes the censure of peasants, though the squires, as doing justiceship, send him to the prison and the tread-mill.

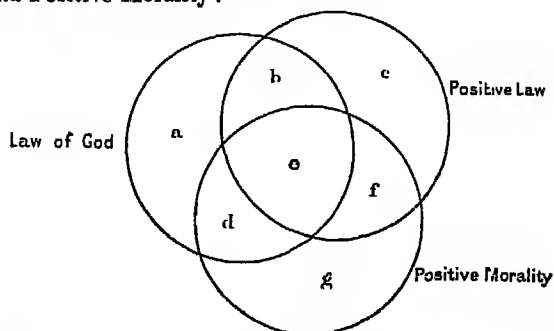
184. One of these bodies of laws conflicts with another, when acts, which are enjoined or forbidden by the former, are forbidden or enjoined by the latter. For example, In most of the nations of modern Europe, the practice of duelling is forbidden by positive law. It is also at variance with the law which is received in most of those nations as having been set by the Deity in the way of express revelation. But in spite of positive law, and in spite of his religious convictions, a man of the class of gentlemen may be forced by the law of honour to give or to take a challenge. If he forbore from giving, or if he declined a challenge, he might incur the general contempt of gentlemen or men of honour, and might meet with slights and insults sufficient

to embitter his existence. The negative legal duty which certainly is incumbent upon him, and the negative religious duty to which he believes himself subject, are therefore mastered and controlled by that positive moral duty which arises from the so-called law set by the opinion of his class.

185. The simple and obvious considerations to which I have now adverted, are often overlooked by legislators. If they fancy a practice pernicious, or hate it they know not why, they proceed, without further thought, to forbid it by positive law. They forget that positive law may be superfluous or impotent, and therefore may lead to nothing but purely gratuitous vexation. They forget that the moral or the religious sentiments of the community may already suppress the practice as completely as it can be suppressed; or that, if the practice is favoured by those moral or religious sentiments, the strongest possible fear which legal pains can inspire may be mastered by a stronger fear of other and conflicting sanctions.\*

185. Q. Is the phrase "frequent coincidence of positive law and positive morality" consistent with Austin's definition of laws by analogy as rules set and enforced by *mere* opinion? <sup>1</sup>

*Note.—Coincidence and conflict of laws.*—Austin's account of the coincidence and conflict of laws suggests the following diagram of three circles representing respectively the Law of God, Positive law, and Positive Morality:—



Rules which come under classes *a*, *c*, and *g* are readily

<sup>1</sup> Cf §§ 6 111 153. 182. 187

186. In consequence of the frequent coincidence of positive law and morality, and of positive law and the law of God, the true nature and fountain of positive law is often absurdly mistaken by writers upon jurisprudence. Where positive

suggested. Thus "Be ye perfect" illustrates class *a*. It is a Law of God which is neither a Positive Law nor a rule of Positive Morality. An Act of Parliament popularly regarded as immoral would illustrate class *c*. The rule that a man must avenge an insult may be quoted as an example of *g*. When, however, we attempt to give examples of rules coming under the remaining classes, we are confronted by a difficulty of which the existence is suggested in the question preceding the present note. If a law by analogy be defined as a law set and enforced by mere opinion, then a rule of conduct which, in addition to being enforced by popular sentiment, is also enforced by the State, might seem to be taken *ipso facto* out of the sphere of Positive Morality. This however is not Austin's meaning. Reflection upon the fact serves to emphasize his general point of view of laws as rules set by superiors to inferiors. Homicide, in so far as it is prohibited by popular sentiment, is prohibited by a rule set by mere opinion and accordingly by a rule of positive morality. The rule is quite distinct from the corresponding Positive Law, if not as to scope, at least as to source and sanction. Strictly speaking, the phrase coincidence of Positive Morality and Law is not a happy one, since the coincidence is less one of rules than of the acts and forbearances which rules are designed to regulate.

If, however, we regard the above diagram as referring to acts or forbearances, we have to face another difficulty. The act of killing a man from trifling motives may be quoted as illustrating class *c*, since it is an act condemned by all three systems. But let us suppose that Parliament passes a Bill imposing a tax on bachelors, which is to be paid annually. Would a refusal to pay this tax be at once a violation of the Law of God and of Positive Law? If we answer this question in the negative we seem to overlook the fact that divine law ordains loyalty to the State and to the law of the State in all things "lawful." If we answer in the affirmative we make nearly all disobedience to Positive Law disobedience to divine law. Popular usage limits the conception of an act in conflict with the Law of God to acts which immediately contravene, either a special divine precept, or one of the fundamental rules of morality. A similar reflection is suggested in considering the relation of Positive Law to Positive Morality. We speak of an act as being in contravention of Positive Morality when it directly and immediately contravenes

law has been fashioned on positive morality, or where positive law has been fashioned on the law of God, they forget that the copy is the creature of the sovereign, and impute it to the author of the model.

187. For example: Customary laws are positive laws fashioned by judicial legislation upon pre-existing customs. Now, till they become the grounds of judicial decisions upon cases, and are clothed with legal sanctions by the sovereign one or number, the customs are merely rules set by opinions of the governed, and sanctioned or enforced morally: Though, when they become the reasons of judicial decisions upon cases, and are clothed with legal sanctions by the sovereign one or number, the customs are rules of positive law as well as of positive morality. But, because the customs were observed by the governed before they were clothed with sanctions by the sovereign one or number, it is fancied that customary laws exist *as positive laws* by the institution of the private persons with whom the customs originated.

some popularly accepted principle of conduct. If, in the case just suggested, a bachelor refuses to pay his tax, we do not think of his act as being contrary to Positive Morality, save in so far as we consciously refer to the generally accepted rule that a citizen should abide by the laws, and so regard the act as a sort of rebellion.

The above considerations must be borne in mind if we are to make any use of the suggested diagram. If we regard the several circles as referring to rules, not to acts, we must remember that rule in such a case is considered in detachment from the source from which it draws its authority, and the sanction by which it is enforced. "Thou shalt not steal," from this point of view, may be regarded as at once a Law of God, a Positive Law, and a rule of Positive Morality. If, on the other hand, we regard the circles as referring to acts, not to rules, we must remember that an act is not in contravention of a system of rules unless it is directly and immediately prohibited by that system.

Q. Illustrate each of the classes in the above diagram, regarding the circles as referring

(a) to rules,

(b) to acts and forbearances.

188. Again: The portion of positive law which is parcel of the *law of nature* (or, in the language of the classical jurists, which is parcel of the *jus gentium*) is often supposed to emanate, even as positive law, from a Divine or Natural source. But (admitting the distinction of positive law into law natural and law positive) it is manifest that law natural, considered as a portion of positive, is the creature of human sovereigns, and not of the Divine monarch. To say that it emanates, as positive law, from a Divine or Natural source, is to confound positive law with law whereon it is fashioned, or with law whereunto it conforms.\*

188. *The Law of Nature.*—The term Law of Nature is used in several distinct senses, of which the following are the most important:—

(1) The whole code of moral duty as determined by Reason as distinct from Revelation.

(2) The ideal totality of the rules of conduct thought fit for political enforcement.

(3) The statement of the sequences of natural or social phenomena. In this sense the term law could only be applied, according to Austin, by metaphor. Moreover, it is used concretely to indicate a particular instance, not a class. To indicate the class, the plural must be employed. So it has been remarked of Savigny that he substituted natural laws for Natural Law. The subject will receive further consideration in discussing laws by metaphor.

Austin's remark on the relation of the Law of Nature to Positive Law may seem obvious. That it was not always so may be illustrated by the following dictum from the argument in Calvin's case: "The leageance or faith of the subject is due to the king by the law of nature, which is part of the law of England; existed before any judicial or municipal law, and is immutable."<sup>1</sup> "The mediæval notion of sovereignty," writes Dr. Gierke, "always differed from that exalted notion which prevailed in after times. For one thing, there was unanimous agreement that the Sovereign Power, though raised above all Positive, is limited by Natural Law."<sup>2</sup>

<sup>1</sup> Broom, "Constitutional Law," p. 17.

<sup>2</sup> Gierke, "Political Theories of the Middle Age," p. 95.

189. I may here note a prevailing tendency to confound what is with what ought to be law or morality, that is, 1st, to confound positive law with the science of legislation, and positive morality with deontology; and 2ndly, to confound positive law with positive morality, and both with legislation and deontology.\*

190. The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one inquiry; whether it be or be not conformable to an assumed standard, is a different inquiry. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions, the enumeration of the instances in which it has been forgotten would fill a volume.

1st. Tendency to confound positive law with the science of legislation and positive morality with deontology.

191. Sir William Blackstone, for example, says in his "Commentaries," that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from that Divine original.

192. Now, he *may* mean that all human laws ought to conform to the Divine laws. If this be his meaning, I

189. §§ 189-204 were incorporated by Mr. Robert Campbell in his edition of Austin's work, and appended at the end of the present lecture.<sup>1</sup> They are taken from certain notes made by John Stuart Mill of Austin's lectures as originally delivered. Mr. Campbell remarks: "I think it of some value to preserve this passage, both as calculated to aid the student in applying the principles stated in the text, and also as illustrative of the author's mode, when orally amplifying in presence of his class the lecture which in substance he always had committed to writing." I have ventured to include the passages in the body of the lecture instead of at the end, as they are closely connected with the subject-matter of §§ 178-188.

<sup>1</sup> I., 214-19.

assent to it without hesitation. The evils which we are exposed to suffer from the hands of God as a consequence of disobeying His commands are the greatest evils to which we are obnoxious; the obligations which they impose are consequently paramount to those imposed by any other laws, and if human commands conflict with the Divine law, we ought to disobey the command which is enforced by the less powerful sanction; this is implied in the term *ought*: the proposition is identical, and therefore perfectly indisputable.

193. Perhaps, again, he means that human lawgivers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard, because if they do not, God will punish them. To this also I entirely assent: for if the index to the law of God be the principle of utility, that law embraces the whole of our voluntary actions in so far as motives applied from without are required to give them a direction conformable to the general happiness.

194. But the meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: that no human law which conflicts with the Divine law is obligatory or binding; in other words, that no human law which conflicts with the Divine law *is a law*, for a law without an obligation is a contradiction in terms. I suppose this to be his meaning, because when we say of any transaction that it is invalid or void, we mean that it is not binding: as, for example, if it be a contract, we mean that the political law will not lend its sanction to enforce the contract.

195. Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be

prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God, was never heard in a Court of Justice, from the creation of the world down to the present moment.

196. But this abuse of language is not merely puerile, it is mischievous. When it is said that a law ought to be disobeyed, what is meant is that we are urged to disobey it by motives more cogent and compulsory than those by which it is itself sanctioned. If the laws of God are certain, the motives which they hold out to disobey any human command which is at variance with them are paramount to all others. But the laws of God are not always certain. All divines, at least all reasonable divines, admit that no scheme of duties perfectly complete and unambiguous was ever imparted to us by revelation. As an index to the Divine will, utility is obviously insufficient. What appears pernicious to one person may appear beneficial to another. And as for the moral sense, innate practical principles, conscience, they are merely convenient cloaks for ignorance or sinister interest: they mean either that I hate the law to which I object and cannot tell why, or that I hate the law, and that the cause of my hatred is one which I find it incommodious to avow. If I say openly, I hate the law, *ergo*, it is not binding and ought to be disobeyed, no one will listen to me: but by calling my hate my conscience or my moral sense, I urge the same argument in another and a more plausible form: I seem to assign a reason for my dis-



like, when in truth I have only given it a sounding and specious name. In times of civil discord the mischief of this abuse of language is apparent. In quiet times the dictates of utility are fortunately so obvious that the anarchical doctrine sleeps, and men habitually admit the validity of laws which they dislike. To prove by pertinent reasons that a law is pernicious is highly useful, because such process may lead to the abrogation of the pernicious law. To incite the public to resistance by determinate views of *utility* may be useful, for resistance, grounded on clear and definite prospects of good, is sometimes beneficial. But to proclaim generally that all laws which are pernicious or contrary to the will of God are void and not to be tolerated, is to preach anarchy, hostile and perilous as much to wise and benign rule as to stupid and galling tyranny.

Another  
example  
from  
Black-  
stone.

197. In another passage of his "Commentaries," Blackstone enters into an argument to prove that a master cannot have a right to the labour of his slave. Had he contented himself with expressing his *disapprobation*, a very well-grounded one certainly, of the institution of slavery, no objection could have been made to his so expressing himself. But to dispute the existence or the possibility of the right is to talk absurdly. For in every age, and in almost every nation, the right has been given by positive law, whilst that pernicious disposition of positive law has been backed by the positive morality of the free or master classes.'

Example  
from the  
writers on  
interna-  
tional law.

198. Grotius, Puffendorff, and the other writers on the so-called law of nations, have fallen into a similar confusion of ideas: they have confounded positive international

197. On the general subject of this section *Sommersett's case* (1771-2) and the case of *Stanley v. Harvey* (1762) deserve attention.<sup>1</sup>

<sup>1</sup> Broom, "Constitutional Law," pp. 59, 114; 2 Eden, p. 126.

morality, or the rules which actually obtain among civilized nations in their mutual intercourse, with their own vague conceptions of international morality as it *ought to be*, with that indeterminate something which they conceived it would be, if it conformed to that indeterminate something which they call the law of nature. Professor Von Martens, of Göttingen, is actually the first of the writers on the law of nations who has seized this distinction with a firm grasp. He distinguished the rules which ought to be received in the intercourse of nations from those which *are* so received, endeavoured to collect from the practice of civilized communities what are the rules actually recognized and acted upon by them, and gave to these rules the name of positive international law.

199. I have given several instances in which law and morality as they ought to be are confounded with the law and morality which actually exist. I shall next mention some examples in which positive law is confounded with positive morality, and both with the science of legislation and deontology.

200. Those who know the writings of the Roman lawyers only by hearsay are accustomed to admire their philosophy. Now this, in my estimation, is the only part of their writings which deserves contempt. Their extraordinary merit is evinced not in general speculation, but as expositors of the Roman law. They have seized its general principles with great clearness and penetration, have applied these principles with admirable logic to the explanation of details, and have thus reduced this positive system of law to a compact and coherent whole. But the philosophy which they borrowed from the Greeks, or which, after the examples of the Greeks, they themselves fashioned, is naught. Their attempts to define jurisprudence and to determine the province of the jurisconsult are pitiable.

2nd. Tendency to confound positive law with positive morality, and both with legislation and deontology.

201. At the commencement of the Digest is a passage attempting to define jurisprudence. I shall first present you with this passage in a free translation, and afterwards in the original. 'Jurisprudence,' says this definition, 'is the knowledge of things divine and human; the science which teaches men to discern the just from the unjust.' '*Jurisprudentia est divinarum atque humanarum rerum notitia, justī atque injustī scientia.*' In the excerpt from Ulpian, which is placed at the beginning of the Digest, it is attempted to define the office or province of the jurisconsult. 'Law,' says the passage, 'derives its name from justice, *justitia*, and is the science or skill in the good and the equitable. Law being the creature of justice, we the jurisconsults may be considered as her priests, for justice is the goddess whom we worship, and to whose service we are devoted. Justice and equity are our vocation; we teach men to know the difference between the just and the unjust, the lawful and the unlawful; we strive to reclaim them from vice, not only by the terrors of punishment, but also by the blaudishment of rewards; herein, unless we flatter ourselves, aspiring to sound and real philosophy, and not like some whom we could mention, contenting ourselves with vain and empty pretension.' '*Juri operam daturum prius nosse oportet, unde nomen juris descendat. Est autem a justitia appellatum; nam, ut eleganter Celsus definit, jus est ars boni et æqui. Cujus merito quis nos sacerdotes appellet; justitiam namque colimus, et boni et æqui notitiam profite-mur, æquum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu pœnarum verum etiam præmiorum quoque exhortatione efficere cupientes, veram, nisi fallor, philosophiam, non simulatam affectantes.*'

202. Were I to present you with all the criticisms which these two passages suggest, I should detain you a full hour. I shall content myself with one. Jurisprudence, if it is

anything, is the science of law, or at most the science of law combined with the art of applying it; but what is here given as a definition of it, embraces not only law, but positive morality, and even the test to which both these are to be referred. It therefore comprises the science of legislation and deontology. Further, it affirms that law is the creature of justice, which is as much as to say that it is the child of its own offspring. For when by *just* we mean anything but to express our own approbation we mean something which *accords with some given law*. True, we speak of law and justice, or of law and equity, as opposed to each other, but when we do so, we mean to express mere dislike of the law, or to intimate that it conflicts with another law, the law of God, which is its standard. According to this, every pernicious law is unjust. But, in truth, law is itself the standard of justice. What deviates from any law is unjust with reference to that law, though it may be just with reference to another law of superior authority. The veriest dolt who is placed in a jury box, the merest old woman who happens to be raised to the bench, will talk finely of equity or justice—the justice of the case, the equity of the case, the imperious demands of justice, the plain dictates of equity. He forgets that he is there to enforce *the law of the land*, else he does not administer that justice or that equity with which alone he is immediately concerned.\*

203. This is well known to have been a strong tendency of Lord Mansfield—a strange obliquity in so great a man. Example  
from Lord  
Mansfield.

202. Mr. Leslie defends Ulpian's idealism. "The greatest lawyer—be he judge or jurist—is he who combines a firm grasp of the material realities of life with a clear vision of the ideal beyond."<sup>1</sup>

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<sup>1</sup> "Journal of Comparative Legislation," XI, pp. 23-4, article on *Ulpian*.

I will give an instance. By the English law, a promise to give something or to do something for the benefit of another is not binding without what is called a consideration, that is, a motive assigned for the promise, which motive must be of a particular kind. Lord Mansfield, however, overruled the distinct provisions of the law by ruling that moral obligation was a sufficient consideration. Now, moral obligation is an obligation imposed by opinion, or an obligation imposed by God: that is, moral obligation is anything which we choose to call so, for the precepts of positive morality are infinitely varying, and the will of God, whether indicated by utility or by a moral sense, is equally matter of dispute. This decision of Lord Mansfield, which assumes that the judge is to enforce morality, enables the judge to enforce just whatever he pleases.\*

Judicial  
legisla-  
tion.

204. I must here observe that I am not objecting to Lord Mansfield for assuming the office of a legislator. I by no means disapprove of what Mr. Bentham has chosen to call by the disrespectful name of judge-made law. I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact

205. The doctrine attributed by Austin to Lord Mansfield was upheld by Sir James Mansfield in *Lee v. Muggerridge*.<sup>1</sup> It was definitely overruled by Lord Denman in *Eastwood v. Kenyon*,<sup>2</sup> the learned judge remarking that the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise createe a moral obligation to support it. The subject is discussed by Sir William Markby, who contends that an express undertaking of a liability ought to be held binding, "not upon the stupid ground that a moral consideration supports a promise, but upon the ground that a liability was intended and ought to be enforced."<sup>3</sup>

<sup>1</sup> Tannton, V, p. 36.

<sup>2</sup> A. and E. XI, p. 446.

<sup>3</sup> "Elements of Law," 5th ed., pp. 317-18.

exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature. Notwithstanding my great admiration for Mr. Bentham, I cannot but think that, instead of blaming judges for having legislated, he should blame them for the timid, narrow, and piecemeal manner in which they have legislated, and for legislating under cover of vague and indeterminate phrases, such as Lord Mansfield employed in the above example, and which would be censurable in any legislator.\*

205. The foregoing distribution of laws proper, and of such improper laws as are closely analogous to the proper, tallies, in the main, with a division of laws which is given incidentally by Locke in his Essay on Human Understanding. And since this division of laws, or of the source of duties or obligations, is recommended by the great authority which the writer has justly acquired, I gladly append it to my own division or analysis. The passage of his essay in which the division occurs, is part of an inquiry into the nature of *relation*, and is therefore concerned indirectly with the nature and kinds of *law*. With the exclusion of all that is foreign to the nature and kinds of law, with the exclusion of a few expressions which are obviously redundant, and with the

204. §§ 202 and 204 should be carefully compared. In the earlier section, the judge held up for admiration is the judge who abides by the law; in the later section, the judge held up for admiration is the judge who adds to the law.

Q. (1) How are these apparently inconsistent sections to be reconciled?<sup>1</sup>

(2) Examine the statement that the subject-matter of Jurisprudence consists of "the principles on which the courts ought to decide cases."<sup>2</sup>

<sup>1</sup> Cf. EXCURSUS C, *infra*.

<sup>2</sup> Professor Gray, "Harvard Law Review," April, 1892, p. 27.

correction of a few expressions which are somewhat obscure, the passage containing the divisions may be rendered in the words following :

‘Good or evil is nothing but pleasure or pain, or that which occasions or procures pleasure or pain to us. *Moral good or evil*, then, is only the conformity or disagreement of our voluntary actions to some law, whereby good or evil is drawn on us by the will and power of the law-maker : which good or evil, pleasure or pain, attending our observance or breach of the law, by the decree of the law-maker, is that we call reward or punishment.

‘Of these moral rules or laws, to which men generally refer, and by which they judge of the rectitude or pravity of their actions, there seem to me to be three sorts, with their three different enforcements, or rewards and punishments. For since it would be utterly in vain to suppose a rule set to the free actions of man, without annexing to it some enforcement of good and evil to determine his will, we must, wherever we suppose a law, suppose also some reward or punishment annexed to that law. It would be in vain for one intelligent being to set a rule to the actions of another, if he had it not in his power to reward the compliance with, and punish deviation from his rule, by some good and evil that is not the natural product and consequence of the action itself : for that being a natural convenience or inconvenience, would operate of itself without a law. This, if I mistake not, is the true nature of all *law* properly so called.

‘The laws that men generally refer their actions to, to judge of their rectitude or obliquity, seem to me to be these three : 1. The *Divine* law. 2. The *civil* law. 3. The law of *opinion* or *reputation*, if I may so call it.—By the relation they bear to the first of these, men judge whether their actions are sins or duties : by the second, whether they be

criminal or innocent: and by the third, whether they be virtues or vices.

‘By the *Divine* law, I mean that law which God hath set to the actions of men, whether promulgated to them by the light of nature, or the voice of revelation. This is the only true touchstone of *moral rectitude*.

‘*Virtue* and *vice* are names pretended, and supposed everywhere to stand for actions in their own nature right or wrong: and as far as they really are so applied, they so far are coincident with the Divine law above mentioned. But yet, whatever is pretended, this is visible, that these names *virtue* and *vice*, in the particular instances of their application through the several nations and societies of men in the world, are constantly attributed to such actions only as in each country and society are in reputation or discredit. Nor is it to be thought strange, that men everywhere should give the name of *virtue* to those actions which amongst them are judged praiseworthy, and call that *vice* which they account blameable; since they would condemn themselves, if they should think anything *right*, to which they allowed not commendation; anything *wrong*, which they let pass without blame.

‘Thus the measure of what is everywhere called and esteemed *virtue* and *vice*, is this approbation or dislike, praise or blame, which by a secret and tacit consent establishes itself in the several societies, tribes, and clubs of men in the world whereby several actions come to find credit or disgrace amongst them, according to the judgment, maxims, or fashions of that place.

‘But though, by the different temper, education, fashion, maxims, or interest of different sorts of men, it fell out, that what was thought praiseworthy in one place, escaped not censure in another, and so in different societies *virtues* and *vices* were changed, yet, as to the main, they for the most



part kept the same everywhere. For since nothing can be more natural, than to encourage with esteem and reputation that wherein everyone finds his advantage, and to blame and discountenance the contrary, it is no wonder that esteem and discredit, virtue and vice, should in a great measure everywhere correspond with the unchangeable rule of right and wrong which the law of God hath established: there being nothing that so directly and visibly secures and advances the general good of mankind in this world as obedience to the law He has set them, and nothing that breeds such mischiefs and confusion as the neglect of it. And therefore men, without renouncing all sense and reason, and their own interest, could not generally mistake in placing their commendation or blame on that side which really deserved it not. Nay, even those men, whose practice was otherwise, failed not to give their approbation right: few being depraved to that degree, as not to condemn, at least in others, the faults they themselves were guilty of. Whereby, even in the corruption of manners, the law of God, which ought to be the rule of virtue and vice, was pretty well observed.

‘If any one shall imagine that I have forgotten my own notion of a law, when I make the law, whereby men judge of *virtue* and *vice*, to be nothing but the consent of private men who have not authority to make a law; especially wanting that which is so necessary and essential to a law, a power to enforce it: I think, I may say, that he who imagines commendation and disgrace not to be strong motives on men to accommodate themselves to the opinions and rules of those with whom they converse, seems little skilled in the nature or history of mankind: The greatest part whereof he shall find to govern themselves chiefly, if not solely, by this law of fashion: and so they do that which keeps them in reputation with their company, little regard the law of God or the magistrate. The penalties that attend the breach of God’s

law, some, nay, perhaps, most men seldom seriously reflect on; and amongst those that do, many, whilst they break the law, entertain thoughts of future reconciliation, and making their peace for such breaches. And as to the punishments due from the law of the commonwealth, they frequently flatter themselves with the hope of impunity. But no man escapes the punishment of their censure and dislike, who offends against the fashion and opinion of the company he keeps, and would recommend himself to. Nor is there one of ten thousand, who is stiff and insensible enough to bear up under the constant dislike and condemnation of his own club. He must be of a strange and unusual constitution, who can content himself to live in constant disgrace and disrepute with his own particular society. Solitude many men have sought and been reconciled to: but nobody that has the least thought or sense of a man about him, can live in society under the constant dislike and ill opinion of his familiars, and those he converses with. This is a burthen too heavy for human sufferance: and he must be made up of irreconcilable contradictions, who can take pleasure in company, and yet be insensible of contempt and disgrace from his companions.'—*Essay concerning Human Understanding*. Book II. Chap. XXVIII.

206. The analogy borne to a law proper by a law which opinion imposes, lies mainly in the following point of resemblance. In the case of a law set by opinion, as well as in the case of a law properly so called, a rational being or beings are subject to contingent evil, in the event of their not complying with a known or presumed desire of another being or beings of a like nature. The analogy between a law in the proper acceptation of the term, and a law improperly so called which opinion sets or imposes, is, therefore, strong. The defect which excludes the latter from the rank of a law proper, merely consists in this: that the wish

Laws  
metapho-  
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or desire of its authors has not been duly signified, and that they have no formed intention of inflicting evil or pain upon those who may break or transgress it.

207. But, beside the laws improper which are set or imposed by opinion, there are laws improperly so called which are related to laws proper by remote analogies. I style these laws metaphorical, or laws merely metaphorical. The analogies by which they are suggested will hardly admit of a common and positive description; but laws metaphorical have the following common and negative nature.—No property or character of any metaphorical law can be likened to a sanction or a duty. Consequently, every metaphorical law wants that point of resemblance which mainly constitutes the analogy between a law proper and a law set by opinion.

Examples. 208. The most frequent and remarkable of those metaphorical applications is suggested by that uniformity, or that stability of conduct, which is one of the ordinary consequences of a law proper. We say, for instance, that the movements of lifeless bodies are determined by certain *laws*: though, since the bodies are lifeless and have no desires or aversions, they cannot be touched by aught which in the least resembles a sanction, and cannot be subject to aught which in the least resembles an obligation. We mean that they move in certain uniform modes, and that they move in those uniform modes through the pleasure and appointment of God: just as parties obliged behave in a uniform manner through the pleasure and appointment of the party who imposes the law and the duty.—Again: We say that certain actions of the lower and irrational animals are determined by certain *laws*: though, since they cannot understand the purpose and provisions of a law, it is impossible that sanctions should effectually move them to obedience, or that their conduct should be guided by a regard to

duties or obligations. We mean that they act in certain uniform modes, either in consequence of instincts (or causes which we cannot explain), or else in consequence of hints which they catch from experience and observation: and that, since their uniformity of action is an effect of the Divine pleasure, it closely resembles the uniformity of conduct which is wrought by the authors of laws in those who are obnoxious to the sanctions.—In short, whenever we talk of *laws* governing the irrational world, the metaphorical application of the term *law* is suggested by this double analogy.

1. The successive and synchronous phenomena composing the irrational world, happen and exist, for the most part, in uniform series: which uniformity of succession and coexistence resembles the uniformity of conduct produced by an imperative law. 2. That uniformity of succession and coexistence, like the uniformity of conduct produced by an imperative law, springs from the will and intention of an intelligent and rational author.—When an atheist speaks of *laws* governing the irrational world, the metaphorical application is suggested by an analogy still more slender and remote than that which I have now analysed. He means that the uniformity of succession and coexistence resembles the uniformity of conduct produced by an imperative rule. If, to draw the analogy closer, he ascribes those laws to an author, he personifies a verbal abstraction, and makes it play the legislator. He attributes the uniformity of succession and coexistence to laws set by nature: meaning, by nature, the world itself; or, perhaps, that very uniformity which he imputes to nature's commands.\*

208. Q. "You say the laws of matter are inevitable; but in what sense—potentially or actually? Cannot each law be interfered with at any moment by some other law, so that the first law, though it may struggle for the mastery, shall be for an indefinite time utterly defeated? The law of gravity is immutable enough. But do all stones veritably fall to the ground? Certainly not, if I

209. Many metaphorical applications of the term *law* or *rule* are suggested by the analogy following.—An imperative

choose to catch one and keep it in my hand. It remains there by laws; and the law of gravity is there too, making it feel heavy in my hand; but it has not fallen to the ground, and will not, till I let it. So much for the inevitable action of the laws of gravity, as of others. Potentially, it is immutable; but actually, it can be conquered by other laws." Criticize the conception of a natural law implied in this passage.

*Note.—Natural laws.*—The fallacy into which Kingsley falls in the above-quoted passage is by no means uncommon. In many minds, a disposition exists to personify nature and to regard it as issuing orders to which matter must conform; for example, commanding all stones to fall to the ground. According to this view, all stones do their best to get to ground, impelled thereto by the law which nature has set. In reality, natural laws are not impelling forces, but abstract formulæ. Thus with regard to the law of gravitation we have to distinguish:

(1) *Gravity*, i.e. the attraction which one body has for another.  
 (2) *The law of gravity*, viz. that the attraction of one body for another varies directly as the mass and inversely as the square of the distance.

(3) The immediate consequence in any particular case resulting from the combined action of gravity and of other forces.

The conception of a natural law is applicable to society as well as to external nature. It is in the former connection that most difficulty is likely to be felt in distinguishing the law metaphorical from other laws. "Moral principles, when they are true," affirms Mr. John Morley, "are at bottom only registered generalizations from experience. They record certain uniformities of antecedence and consequence in the region of human conduct."<sup>1</sup> While a difference of opinion may exist as to whether moral principles are not something more than this, no one will doubt that most moral principles can be expressed in the form suggested by Mr. Morley, and that when so expressed they belong to the class of laws by metaphor. "Spasak the Truth" is a law by analogy, whilst the statement of Whately—"It makes all the difference in the world whether we put truth in the first or the second place"—may be described as a law by metaphor. That one implies the other may be admitted. The expression of a moral principle, however, may easily take such a form that it is open to doubt whether we are, or are not, thinking in the realm of law by metaphor.

law or rule guides the conduct of the obliged, or is a *norma*, model, or pattern, to which their conduct conforms. A proposed guide of human conduct, or a model or pattern offered to human imitation, is, therefore, frequently styled a law or rule of conduct, although there be not in the case a shadow of a sanction or a duty.

210. For example: To every law properly so called there are two distinct parties: a party by whom it is established, and a party to whom it is set. But, this notwithstanding, we often speak of a law set by a man to himself: meaning that he intends to pursue some given course of conduct as exactly as he would pursue it if he were bound to pursue it by a law. An intention of pursuing exactly some given course of conduct, is the only law or rule which a man can set to himself. The binding virtue of a law lies in the sanction annexed to it. But in the case of a so-called law set by a man to himself, he is not constrained to observe it by aught that resembles a sanction. For though he may fairly purpose to inflict a pain on himself, if his conduct shall depart from the guide which he intends it shall follow, the infliction of the conditional pain depends upon his own will.—Again: When we talk of *rules* of art, the metaphorical application of the term *rules* is suggested by the analogy in question. By a *rule* of art, we mean a prescription or pattern which is offered to practitioners of an art, and which they are advised to observe when performing some given process. There is not the semblance of a sanction, nor is there the shadow of a duty. But the offered prescription or pattern may guide the conduct of practitioners, as a rule imperative and proper guides the conduct of the obliged.\*

210. Q. (1) Would it be any answer to Austin's argument with respect to self-imposed law to plead that legal sanctions are almost invariably conditional upon the will of the offender, since he may commit suicide?

(2) Ought not the class of laws by analogy to have been

Laws metaphorical or figurative are often blended and confounded with laws imperative and proper.

211. The preceding disquisition on figurative laws is not so superfluous as some of my hearers may deem it. Figurative laws are not unfrequently mistaken for laws imperative and proper. Nay, attempts have actually been made, and by writers of the highest celebrity, to explain and illustrate the nature of laws imperative and proper, by allusions to so-called laws which are merely such through a metaphor. For instance, in an excerpt from Ulpian placed at the beginning of the Pandects, and also inserted by Justinian in the second title of his Institutes, a fancied *jus naturale*, common to all animals, is thus distinguished from the *jus naturale* or *gentium* to which I have adverted above. *Jus naturale* est, quod natura omnia animalia docuit: nam jus istud non humani generis proprium, sed omnium animalium quæ in terra, quæ in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminæ conjunctio, quam nos matrimonium appellamus; hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam, istius juris peritia censer. *Jus gentium* est, quo gentes humanæ utuntur. Quod a naturali recedere, inde facile intelligere licet; quia illud omnibus animalibus, hoc solis hominibus inter se commune est.' The *jus naturale*

widened so as to include self-imposed laws in preference to grouping such laws with statements of sequence?

(3) Compare Austin's point of view with that expressed by T. H. Green in the following passage: "It is the very essence of moral duty to be imposed by a man on himself. The moral duty to obey a positive law, whether a law of the State or of the Church, is imposed not by the author or enforcer of the Positive Law, but by that spirit of man, which sets before him the ideal of a perfect life."<sup>1</sup>

(4) May we not say of the rules of literary art that they represent certain opinions of educated men to which literary artists must conform under pain of censure and neglect? And that in consequence they are laws by analogy?

which Ulpian here describes, and which he here distinguishes from the *jus naturale* or *gentium*, is a name for the instincts of animals. More especially, it denotes that instinctive appetite which leads them to propagate their kinds, with that instinctive sympathy which inclines parent animals to nourish and educate their young. Now, the instincts of animals are related to laws by the slender or remote analogy which I have already endeavoured to explain. They incline the animals to act in certain uniform modes, and they are given to the animals for that purpose by an intelligent and rational Author. But these metaphorical laws which govern the lower animals and which govern (though less despotically) the human species itself, should not have been blended and confounded, by a grave writer upon jurisprudence, with laws properly so called. It is true that the instincts of the animal man, like many of his affections which are not instinctive, are amongst the causes of laws in the proper acceptation of the term. More especially, the laws regarding the relation of husband and wife, and the laws regarding the relation of parent and child, are mainly caused by the instincts which Ulpian particularly points at. And that, it is likely, was the reason which determined this legal oracle to class the instincts of animals with laws imperative and proper. But nothing can be more absurd than the ranking with laws themselves the causes which lead to their existence. And if human instincts are laws because they are causes of laws, there is scarcely a faculty or affection belonging to the human mind, and scarcely a class of objects presented by the outward world, that must not be esteemed a law and an appropriate subject of jurisprudence.—I must, however, remark, that the *jus quod natura omnia animalia docuit* is a conceit peculiar to Ulpian : and that this most foolish conceit, though inserted in Justinian's compilations, has' no perceptible influence on



the detail of the Roman law. The *jus naturale* of the classical jurists generally, and the *jus naturale* occurring generally in the Pandects, is equivalent to the *natural law* of modern writers upon jurisprudence, and is synonymous with the *jus gentium*, or the *jus naturale et gentium*. It means those positive laws and those rules of positive morality, which are not peculiar or appropriate to any nation or age, but obtain, or are thought to obtain, in all nations and ages: and which, by reason of their obtaining in all nations and ages, are supposed to be formed or fashioned on the law of God or Nature as known by the moral sense. 'Omnes populi' (says Gaius), 'qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur. Nam quod quisque populus ipse sibi jus constituit, id ipsius proprium est, vocaturque jus civile; quasi jus proprium ipsius civitatis. Quod vero naturalis ratio inter omnes homines constituit, id aput omnes populos peræque custoditur, vocaturque jus gentium; quasi quo jure omnes gentes utuntur.' The universal *leges et mores* here described by Gaius, and distinguished from the *leges et mores* peculiar to a particular nation, are styled indifferently, by most of the classical jurists, *jus gentium*, *jus naturale*, or *jus naturale et gentium*. And the law of nature, as thus understood, is not intrinsically absurd. For as some of the dictates of utility are always and everywhere the same, and are also so plain and glaring that they hardly admit of mistake, there are legal and moral rules which are nearly or quite *universal*, and the expediency of which must be seen by merely *natural* reason, or by reason without the lights of extensive experience and observation. The distinction of law and morality into natural and positive, is a needless and futile subtilty: but still the distinction is founded on a real and manifest difference. The *jus naturale* or *gentium* would be liable to little objection, if it were not supposed to be the offspring of

a moral instinct or sense, or of innate practical principles. But, since it is closely allied to that misleading and pernicious jargon, it ought to be expelled, with the *natural law* of the moderns, from the sciences of jurisprudence and morality.\*

212. The following passage is the first sentence in Montesquieu's *Spirit of Laws*: 'Les lois, dans la signification la plus étendue, sont les rapports nécessaires qui dérivent de la nature des choses : et dans ce sens tous les êtres ont leurs lois : la Divinité a ses lois ; le monde matériel a ses lois ; les intelligences supérieures à l'homme ont leurs lois ; les bêtes ont leurs lois ; l'homme a ses lois.' Now objects widely different, though bearing a common name, are here blended and confounded. Of the laws which govern the conduct of intelligent and rational creatures, some are laws imperative and proper, and others are closely analogous to laws of that description. But the so-called laws which govern the material world, with the so-called laws which govern the

211. Savigny makes the following interesting apology for Ulpian's text: "The first thing which astonishes in this text, and by reason of which it has often been severely blamed, is the law and consciousness of law ascribed to beasts. When, however, the certainly ill-chosen expression is abandoned, the view itself admits of easy defence against that censure. Each jurial relation has for its foundation matter of some kind, to which the form of law is applied and which therefore can also be conceived abstracted from this form. This material is, in most of the jurial relations, so far of an arbitrary kind that a continuous existence of the human race can also be conceived without it; thus in property and obligations. Not so with the two relations above named, which are rather universal natural relations common to men and beasts and without which the human race could have no enduring existence. In fact, therefore, it is not the law (right), but the material of the law (right), the natural relation lying at its base, which is ascribed to beasts. This view now is not merely true, but also important and worthy of notice."<sup>1</sup>

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<sup>1</sup> Savigny's "Roman Law," translated by HOLLOWAY, pp. 338-9.

lower animals, are merely laws by a metaphor. And the so-called laws which govern or determine the Deity are clearly in the same predicament. If his actions were governed or determined by laws imperative and proper, he would be in a state of dependence on another and superior being. When we say that the actions of the Deity are governed or determined by laws, we mean that they conform\* to intentions which the Deity himself has conceived, and which he pursues or observes with inflexible steadiness or constancy. To mix these figurative laws with laws imperative and proper, is to obscure, and not to elucidate, the nature or essence of the latter. The beginning of the passage is worthy of the sequel. We are told that laws are the necessary relations which flow from the nature of things. But what, I would crave, are relations? What, I would also crave, is the nature of things? And how do the necessary relations which flow from the nature of things differ from those relations which originate in other sources? The terms of the definition are incomparably more obscure than the term which it affects to expound.

213. If you read the disquisition in Blackstone on the nature of laws in general, or the description of law in Hooker's *Ecclesiastical Polity*, you will find the same confusion of laws imperative and proper with laws which are merely such by a glaring perversion of the term. The cases of this confusion are, indeed, so numerous, that they would fill a considerable volume.\*

213. Blackstone's definition of Positive Law runs: "A rule of civil conduct prescribed by the supreme power in a state commanding what is right and prohibiting what is wrong."<sup>1</sup> "Of law," declared Hooker, "there can be no lesse acknowledged, than that her seate is in the bosome of God, her voyce the harmony of the world."<sup>2</sup>

\* *Commentaries*, I, p. 44.    \* *"Ecclesiastical Polity,"* I, c. 18.

214. From the confusion of laws metaphorical with laws <sup>Physical</sup> imperative and proper, I turn to a mistake, somewhat similar, <sup>or natural</sup> which, I presume to think, has been committed by Mr. Bentham. Sanctions proper and improper are of three capital classes: the sanctions properly so called which are annexed to the laws of God; the sanctions properly so called which are annexed to positive laws; the sanctions properly so called, and the sanctions closely analogous to sanctions properly so called, which respectively enforce compliance with positive moral rules. But to sanction religious, legal, and moral, this great philosopher and jurist adds a class of sanctions which he styles *physical* or *natural*.

215. When he styles these sanctions physical, he does not intend to intimate that they are distinguished from other sanctions by the mode wherein they operate; he does not intend to intimate that these are the only sanctions which affect the suffering parties through physical or material means. His meaning may, I believe, be rendered in the following manner.—A physical sanction is an evil brought upon the suffering party by an act or omission of his own. But, though it is brought upon the sufferer by an act or omission of his own, it is not brought upon the sufferer through any Divine law, or through any positive law, or rule of positive morality. For example: if your house be destroyed by fire through your neglecting to put out a light, you bring upon yourself, by your negligent omission, a physical or natural sanction: supposing, I mean, that your omission is not to be deemed a sin, and that the consequent destruction of your house is not to be deemed a punishment, inflicted by the hand of the Deity.

216. Such physical or natural evils are related by the following analogy to sanctions properly so called. 1. When they are actually suffered, they are suffered by rational beings through acts or omissions of their own. 2. Before

they are actually suffered, or whilst they exist in prospect they affect the wills or desires of the parties obnoxious to them as sanctions properly so called affect the wills of the obliged. The parties are urged to the acts which may avert the evils from their heads, or the parties are deterred from the acts which may bring the evils upon them.

217. But in spite of the specious analogy at which I have now pointed, I dislike, for various reasons, the application of the term sanction to these physical or natural evils. Of those reasons I will briefly mention the following.—

1. Although these evils are suffered by intelligent rational beings through acts or omissions of their own, they are not suffered as consequences of their not complying with desires of intelligent rational beings. The analogy borne by these evils to sanctions properly so called, is nearly as remote as the analogy borne by laws metaphorical to laws imperative and proper. 2. By the term sanction, as it is now restricted, the evils enforcing compliance with laws imperative and proper, or with the closely analogous laws which opinion sets or imposes, are distinguished from other evils briefly and commodiously. If the term were commonly extended to these physical or natural evils, this advantage would be lost. The term would then comprehend every possible evil which a man may bring upon himself by his own voluntary conduct.\*

217. Q. (I) Where would the following examples be placed by Austin in his classification of the different kinds of laws?

- (1) The rule that in English the aspirate must be sounded.
- (2) The rules as to the employment of the subjunctive.
- (3) The rule that a sentence should not be prolonged beyond what appears to be its natural close.
- (4) A decision of the French Academy establishing a new grammatical rule.
- (5) A statement of the conditions of success in the art of writing popular editorials.
- (6) "He who would avoid burning his fingers ought not to play with the fire."

218. I close my disquisitions on figurative laws, and on those metaphorical sanctions which Mr. Bentham denominates *physical*, with the following connected remark. Declaratory laws, and laws repealing laws, ought in strictness to be classed with laws metaphorical or figurative: for the analogy by which they are related to laws imperative and proper is extremely slender or remote. Laws of imperfect obligation (in the sense of the Roman jurists) are laws set or imposed by the opinions of the law-makers, and ought in strictness to be classed with rules of positive morality. But though laws of these three species are merely analogous to laws in the proper acceptation of the term, they are closely connected with positive laws, and are appropriate subjects of jurisprudence. Consequently I treat them as improper laws of anomalous or eccentric sorts, and exclude them from the classes of laws to which in strictness they belong.

(7) The directions of an art master to his pupils

(a) on the subject of harmony in colour,

(b) as to hours of attendance.

(8) The suggestions in a work on chemistry as to the best of several ways of conducting a certain experiment.

(9) The laws of legal development.

(10) "The King must assent to Acts passed by both Houses of Parliament."

(11) Moral laws conceived—

(a) As imposed by the conscience.

(b) As conclusions concerning what conduceth to the conservation and defence of Mankind (Hobbes, "Leviathan," Cap. XV).

(c) As precepts based upon practical utility.

(12) "To thinke owself be true, and it must follow as the night the day, thou canst not then be false to any man."

(II) X orders a suit of clothes to be made by his tailor. When the suit arrives, X finds that the tailor has followed the fashions of the early Victorian period. What kinds of law, if any, have been violated (a) by the tailor, (b) by X in wearing the suit?

## CHAPTER III

### THE DEFINITION OF SOVEREIGNTY

Purpose of present lecture. 219. In the present lecture I explain the marks or characters which distinguish positive laws, or laws strictly so called. And, in order to an explanation of the marks which distinguish positive laws, I shall analyse the expression *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*. For the essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be stated thus. Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author. Even though it sprang directly from another fountain or source, it is a positive law, or a law strictly so called, by the institution of that present sovereign in the character of political superior. Or (borrowing the language of Hobbes) 'the legislator is he, not by whose authority the law was first made, but by whose authority it continues to be a law.'

The distinguishing marks of sovereignty and independent 220. The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters.—1. The *bulk* of the given society are in a *habit* of obedience or submission

to a *determinate* and *common* superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain body of individuals, is *not* in a habit of obedience to a determinate human superior. Laws (improperly so called) which opinion sets or imposes, may permanently affect the conduct of that certain individual or body. To express or tacit commands of other determinate parties, that certain individual or body may yield occasional submission. But there is no determinate person, or determinate aggregate of persons, to whose commands, express or tacit, that certain individual or body renders habitual obedience.

221. Or the notions of sovereignty and independent political society may be expressed concisely thus.—If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.

222. To that determinate superior, the other members of the society are *subject*: or on that determinate superior, the other members of the society are *dependent*. The position of its other members towards that determinate superior, is *a state of subjection*, or *a state of dependence*. The mutual relation which subsists between that superior and them, may be styled *the relation of sovereign and subject*, or *the relation of sovereignty and subjection*.

223. Hence it follows, that it is only through an ellipsis, or an abridged form of expression, that the society is styled independent. The party truly independent (independent, that is to say, of a determinate human superior), is not the society, but the sovereign portion of the society. By 'an independent political society,' or 'an independent and



sovereign nation,' we mean a political society consisting of a sovereign and subjects, as opposed to a political society which is merely subordinate: that is to say, which is merely a limb or member of another political society, and which therefore consists entirely of persons in a state of subjection.

Union of  
positive  
and nega-  
tive marks  
necessary.

224. In order that a given society may form a society political and independent, the two distinguishing marks which I have mentioned above must unite. The generality of the given society must be in the habit of obedience to a determinate and common superior; whilst that determinate person, or determinate body of persons must not be habitually obedient to a determinate person or body. It is the union of that positive, with this negative mark, which renders that certain superior sovereign or supreme, and which renders that given society (including that certain superior) a society political and independent. I proceed to illustrate these marks.

(1) Habit  
of obedi-  
ence.

225. (1) In order that a given society may form a society political, the generality or bulk of its members must be in a *habit* of obedience to a determinate and common superior.

226. In case the generality of its members obey a determinate superior, but the obedience be rare or transient and not habitual or permanent, the relation of sovereignty and subjection is not created thereby between that certain superior and the members of that given society.

227. For example: In 1815 the allied armies occupied France; and so long as the allied armies occupied France, the commands of the allied sovereigns were obeyed by the French government, and, through the French government, by the French people generally. But since the commands and the obedience were comparatively rare and transient, they were not sufficient to constitute the relation of sovereignty and subjection between the allied sovereigns and the members of the invaded nation. In spite of those

commands, and in spite of that obedience, the French government was sovereign or independent. And if the French nation, before the obedience to those sovereigns, had been an independent society in a state of nature or anarchy, it would not have been changed by the obedience into a society political.

•228. Again: A feeble state holds its independence precariously, or at the will of the powerful states; it and the bulk of its subjects render obedience to commands which they occasionally express or intimate. Such, for instance, is the position of the Saxon government and its subjects in respect of the conspiring sovereigns who form the Holy Alliance. But since the commands and the obedience are comparatively few and rare, they are not sufficient to constitute the relation of sovereignty and subjection between the powerful states and the feeble state with its subjects. In spite of those commands, and in spite of that obedience, the feeble state is sovereign or independent.\*

229. (2) In order that a given society may form a society (2) By the political, habitual obedience must be rendered, by the *gener- bulk, to a* *ality* or *bulk* of its members, to a determinate and *common* *superior.* *common superior.* In other words, habitual obedience must be rendered, by the generality or bulk of its members, to one and the same determinate person, or determinate body of persons.

230. For example: In case a given society be torn by intestine war, and in case the conflicting parties be nearly balanced, the given society is in one of two positions. If

228. Q. (1) Does a habit of obedience to laws imply a knowledge of what those laws are? Consider in this connection the position of aliens, lunatics, and children.

(2) Does a habit of obedience to laws imply a conscious reference to the sanctions by which they are enforced? Consider in this connection the case of a recluse who never ventures beyond the walls of a monastery.

(3) What proportion of the actions of an ordinary citizen may be said to be regulated by positive law?

the bulk of each of the parties be in a habit of obedience to its head, the given society is broken into two or more societies, which, perhaps, may be styled independent political societies.—If the bulk of each of the parties be not in that habit of obedience, the given society is simply or absolutely in a state of nature or anarchy. It is either resolved into its individual elements, or into numerous societies of an extremely limited size: of a size so extremely limited, that they could hardly be styled societies independent and political. For, as I shall show hereafter, a given independent society would hardly be styled political, in case it fell short of a number which cannot be fixed with precision, but which may be called considerable, or not extremely minute.

(3) Who  
is deter-  
minate.

231. (3) In order that a given society may form a society political, the generality or bulk of its members must habitually obey a superior *determinate* as well as common.

232. On this position I shall not insist here. For I have shown sufficiently in my fifth lecture, that no indeterminate party can command expressly or tacitly, or can receive obedience or submission: that no indeterminate body is capable of corporate conduct, or is capable, as a body, of positive or negative deportment.

(4) And  
not sub-  
ject.

233. (4) It appears from what has preceded, that, in order that a given society may form a society political, the bulk of its members must be in a habit of obedience to a certain and common superior. But, in order that the given society may form a society political and independent, that certain superior must *not* be habitually obedient to a determinate human superior. He may render occasional submission to commands of determinate parties. But the society is not independent, although it may be political, in case that certain superior habitually obey the commands of a certain person or body.

234. Let us suppose, for example, that a viceroy obeys habitually the author of his delegated powers. And, to render the example complete, let us suppose that the viceroy receives habitual obedience from the generality or bulk of the persons who inhabit his province. The viceroy is not sovereign within the limits of his province, nor are he and its inhabitants an independent political society. The viceroy, and (through the viceroy) the generality or bulk of its inhabitants, are habitually obedient or submissive to the sovereign of a larger society. He and the inhabitants of his province are therefore in a state of subjection to the sovereign of that larger society. He and the inhabitants of his province are a society political but subordinate.

235. A natural society, or a society in a state of nature, is composed of persons who are connected by mutual intercourse, but are not members, sovereign or subject, of any society political. None of the persons who compose it lives in the positive state which is styled a state of subjection: or all the persons who compose it live in the negative state which is styled a state of independence.

236. Considered as entire communities, and considered in respect of one another, independent political societies live, it is commonly said, in a state of nature. The expression, however, is not perfectly apposite. Since all the members of each of the related societies are members of a society political, none of the related societies is strictly in a state of nature: nor can the larger society formed by their mutual intercourse be styled strictly a natural society. Speaking strictly, the sovereign and subject members of each of the related societies form a society political: but the sovereign portion of each of the related societies lives in the negative condition which is styled a state of independence.

237. Society formed by the intercourse of independent political societies, is the province of international law, or of

the law obtaining between nations. For (adopting a current expression) international law is conversant about the conduct of independent political societies considered as entire communities: *circa negotia et causas gentium integrarum*. Speaking with greater precision, international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another.

238. And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.

A society  
political  
but subor-  
dinata.

239. A society political but subordinate is merely a limb or member of a society political and independent. All the persons who compose it, including the person or body which is its immediate chief, live in a state of subjection to one and the same sovereign.

A society  
not politi-  
cal, but  
member of  
a society  
political  
and inde-  
pendent.

240. Besides societies political and independent, societies independent but natural, society formed by the intercourse of independent political societies, and societies political but subordinate, there are societies which will not quadrate with any of those descriptions. Though, like a society political but subordinate, it forms a limb or member of a society political and independent, a society of the class in question is not a political society. Although it consists of members living in a state of subjection, it consists of subjects considered as private persons.—A society consisting of parents and children, living in a state of subjection, and considered in those characters, may serve as an example.

241. To distinguish societies political but subordinate from societies not political but consisting of subject members, is to distinguish the rights and duties of subordinate political superiors from the rights and duties of subjects considered as private persons. And before I can draw that distinction, I must analyse many expressions of large and intricate meaning which belong to the detail of jurisprudence. But an explanation of that distinction is not required by my present purpose. To the accomplishment of my present purpose, it is merely incumbent upon me to determine the notion of sovereignty, with the inseparably connected notion of independent political society. For every positive law, or every law simply and strictly so called, is set directly or circuitously by a monarch or sovereign number to a person or persons in a state of subjection to its author.

242. The definition of the abstract term *independent political society* (including the definition of the correlative term *sovereignty*) cannot be rendered in expressions of perfectly precise import, and is therefore a fallible test of specific or particular cases. The least imperfect definition which the abstract term will take, would hardly enable us to fix the class of every possible society. It would hardly enable us to determine of every independent society whether it were political or natural. It would hardly enable us to determine of every political society whether it were independent or subordinate.

The definition of the abstract term *independent political society* cannot be rendered precisely.

243. In order that a given society may form a society political and independent, the positive and negative marks which I have mentioned above must unite. The generality or bulk of its members must be in a habit of obedience to a certain and common superior: whilst that certain person, or certain body of persons, must not be habitually obedient to a certain person or body.

244. But, in order that the bulk of its members may

render obedience to a common superior, *how many* of its members, or *what proportion* of its members, must render obedience to one and the same superior? And, assuming that the bulk of its members render obedience to a common superior, *how often* must they render it, and *how long* must they render it, in order that that obedience may be habitual?—Now since these questions cannot be answered precisely, the positive mark of sovereignty and independent political society is a fallible test of specific or particular cases. It would not enable us to determine of every independent society, whether it were political or natural.

245. In the cases of independent society which lie at the extremes, we should apply that positive test without a moment's difficulty, and should fix the class of the society without a moment's hesitation.—In some of those cases, so large a proportion of the members obey the same superior, and the obedience of that proportion is so frequent and continued, that, without a moment's difficulty and without a moment's hesitation, we should pronounce the society *political*. Such, for example, is the ordinary state of England, and of every independent society somewhat advanced in civilization.—In other of those cases, obedience to the same superior is rendered by so few of the members, or general obedience to the same is so unfrequent and broken, that, without a moment's difficulty and without a moment's hesitation, we should pronounce the society *natural*. Such, for example, is the state of the independent and savage societies which subsist by hunting or fishing in the woods or on the coasts of New Holland.

246. But in the cases of independent society which lie between the extremes, we should hardly find it possible to fix with absolute certainty the class of the given community. For example: During the height of the conflict between Charles the First and the Parliament, the English nation

was broken into two distinct societies: each of which societies may perhaps be styled political, and may certainly be styled independent. After the conflict had subsided, those distinct societies were in their turn dissolved; and the nation was reunited, under the common government of the Parliament, into one independent and political community. But at what juncture precisely after the conflict had subsided, was a common government completely re-established? When had so many of the nation rendered obedience to the Parliament, and when had the general obedience become so frequent and lasting, that the bulk of the nation were habitually obedient to the body which affected sovereignty? And after the conflict had subsided, and until that juncture had arrived, what was the class of the society which was formed by the English people?—These are questions which it were impossible to answer with certainty, although the facts of the case were precisely known.

247. The negative mark of sovereignty and independent political society is also an uncertain measure. Given a determinate and common superior, and also that the bulk of the society habitually obey that superior, is that common superior free from a habit of obedience to a determinate person or body? Is that common superior sovereign and independent, or is that common superior a superior in a state of subjection? Fallibility  
of negative  
test.

248. In numerous cases of political society, it were impossible to answer this question with absolute certainty. For example: Although the Holy Alliance dictates to the Saxon government, the commands which it gives, and the submission which it receives, are comparatively few and rare. Consequently, the Saxon government is sovereign or supreme. But, in case the commands and submission were somewhat more numerous and frequent, we might find it impossible to determine where the sovereignty resided: whether



the Saxon government were a government supreme and independent; or were in a habit of obedience, and therefore in a state of subjection, to the allied or conspiring monarchs.

Illustrations in International Law.

249. The difficulties which I have laboured to explain, often embarrass the application of those positive moral rules which are styled international law.

250. For example: When did the revolted colony, which is now the Mexican nation, ascend from the condition of an insurgent province to that of an independent community? When did the body of colonists, who affected sovereignty in Mexico, change the character of rebel leaders for that of a supreme government? Or (adopting the current language about governments *de jure* and *de facto*) when did the body of colonists, who affected sovereignty in Mexico, become sovereign *in fact*?—And (applying international law to the specific or particular case) when did international law authorize neutral nations to admit the independence of Mexico with the sovereignty of the Mexican government?

251. Now the questions suggested above are equivalent to this: When had the inhabitants of Mexico obeyed that body so generally, and when had that general obedience become so frequent and lasting, that the inhabitants of Mexico were independent of Spain in practice, and were likely to remain permanently in that state of practical independence? At that juncture exactly (let it have arrived when it may), neutral nations were authorized, by the morality which obtains between nations, to admit the independence of Mexico with the sovereignty of the Mexican government. But, by reason of the perplexing difficulties which I have laboured to explain, it was impossible for neutral nations to hit that juncture with precision, and to hold the balance of justice between Spain and her revolted colony with a perfectly even hand.

252. This difficulty presents itself under numerous forms in international law: indeed almost the only difficulty and embarrassing questions in that science arise out of it. And as I shall often have occasion to show, law strictly so called is not free from like difficulties. What can be more indefinite, for instance, than the expressions, *reasonable* time, *reasonable* notice, *reasonable* diligence? Than the line of demarcation which distinguishes libel and fair criticism; than that which constitutes a violation of copyright; than that degree of mental aberration which constitutes idiocy or lunacy? In all these cases, the difficulty is of the same nature with that which adheres to the phrases sovereignty and independent society; it arises from the vagueness or indefiniteness of the terms in which the definition or rule is inevitably conceived.

253. I have tacitly supposed during the preceding analysis, that every independent society forming a society political possesses the essential property which I will now describe.

Compara-  
ble vague-  
ness in  
Positive  
Law.

The nu-  
merical  
question.

254. In order that an independent society may form a society political, it must not fall short of a *number* which cannot be fixed with precision, but which may be called considerable, or not extremely minute. A given independent society, whose number may be called inconsiderable, is commonly esteemed a natural, and not a political society, although the generality of its members be habitually obedient or submissive to a certain and common superior.

255. Let us suppose, for example, that a single family of savages lives in absolute estrangement from every other community. And let us suppose that the father, the chief of this insulated family, receives habitual obedience from the mother and children.—Now, since it is not a limb of another and larger community, the society formed by the parents and children is clearly an independent society. And, since the rest of its members habitually obey its chief, this independent

society would form a society political, in case the number of its members were not extremely minute. But, since the number of its members is extremely minute, it would (I believe) be esteemed a society in a state of nature: that is to say, a society consisting of persons not in a state of subjection. 'La puissance politique' (says Montesquieu) 'comprend nécessairement l'union de plusieurs familles.'

The State  
of Nature.

256. Again: Let us suppose a society which may be styled independent, or which is not a limb of another and larger community. Let us suppose that the number of its members is not extremely minute. And let us suppose it in the savage condition, or in the extremely barbarous condition which closely approaches the savage. Inasmuch as the given society lives in the savage condition, or in the extremely barbarous condition which closely approaches the savage, the generality or bulk of its members is not in a habit of obedience to one and the same superior. For the purpose of attacking an external enemy, or for the purpose of repelling an attack made by an external enemy, the generality or bulk of its members, who are capable of bearing arms, submits to one leader, or to one body of leaders. But so soon as that exigency passes, this transient submission ceases; and the society reverts to the state which may be deemed its ordinary state. The bulk of each of the families which compose the given society, renders habitual obedience to its own peculiar chief: but those domestic societies are themselves independent societies, or are not united or compacted into one political society by general and habitual obedience to a certain and common superior. And, as the bulk of the given society is not in a habit of obedience to one and the same superior, there is no law (simply or strictly so styled) which can be called the law of that given society or community. The so-called laws which are common to the bulk of the community, are purely and properly customary laws:

that is to say, laws which are set or imposed by the general opinion of the community, but which are not enforced by legal or political sanctions.—The state which I have briefly delineated, is the ordinary state of the savage and independent societies which live by hunting or fishing in the woods or on the coasts of New Holland. It is also the ordinary state of the savage and independent societies which range in the forests or plains of the North American continent. It was also the ordinary state of many of the German nations whose manners are described by Tacitus.

257. Now, since the bulk of its members is not in a habit of obedience to one and the same superior, the given independent society would (I believe) be esteemed a society in a state of nature: that is to say, a society consisting of persons not in a state of subjection. But such it could not be esteemed, unless the term *political* were restricted to independent societies whose numbers are not inconsiderable. Supposing that the term *political* applied to independent societies whose numbers are extremely minute, each of the independent families which constitute the given society would form of itself a political community: for the bulk of each of those families renders habitual obedience to its own peculiar chief. And, seeing that each of those families would form of itself an independent political community, the given independent society could hardly be styled with strictness a natural society. Speaking strictly, that given society would form a congeries of independent political communities. Unless the term *political* were restricted to independent societies whose numbers are not inconsiderable, few of the many societies which are commonly esteemed natural could be styled natural societies with perfect precision.

258. For the reasons which I have now produced, and for reasons which I pass in silence, we must, I believe, arrive at

the following conclusion.—A given independent society, whose number may be called inconsiderable, is commonly esteemed a natural, and not a political society, although the generality of its members be habitually obedient or submissive to a certain and common superior. And arriving at that conclusion, we must proceed to this further conclusion.—In order that an independent society may form a ~~society~~ political, it must not fall short of a number which may be called considerable.

259. The lowest possible number which will satisfy that vague condition cannot be fixed precisely. But, looking at many of the communities which commonly are considered and treated as independent political societies, we must infer that an independent society may form a society political, although the number of its members exceed not a few thousands, or exceed not a few hundreds. The ancient Grison Confederacy (like the ancient Swiss Confederacy with which the Grison was connected) was rather an alliance or union of independent political societies, than one independent community under a common sovereign. Now the number of the largest of the societies which were independent members of the ancient Grison Confederacy hardly exceeded a few thousands. And the number of the smallest of those numerous confederated nations hardly exceeded a few hundreds.

260. Here I must briefly remark, that, though the essential property which I have now described is an essential or necessary property of *independent* political society, it is not an essential property of *subordinate* political society. If the independent society, of which it is a limb or member, be a political and not a natural society, a subordinate society may form a society political, although the number of its members might be called extremely minute. For example: A society incorporated by the state

for political or public purposes is a society or body politic: and it continues to bear the character of a society or body politic, although its number be reduced, by deaths or other causes, to that of a small family or small domestic community.\*

261. Having tried to determine the notion of sovereignty, Defini-  
tions of the  
term *sover-*  
*eignty* by  
writers of  
celebrity.  
~~with~~ the implied or correlative notion of independent

260. Q. (1) Define political society. Apply the definition to the following:—

- (a) The inhabitants of a borough.
- (b) The shareholders of a railway company empowered to make by-laws.
- (c) The members of the House of Commons.
- (2) Give illustrations of each of the following classes of

Societies:—

- (a) Independent and Political.
- (b) Political, but not independent.
- (c) Independent, but not political.
- (d) Neither independent nor political.
- (3) Are any of the following societies "natural"?—
  - (a) An International Society of Anarchists.
  - (b) A crew of mutineers.
  - (c) The members of an Arctic expedition.
  - (d) Christendom.

(4) When temporal sovereignty was in the hands of the papacy, the Pope, in addition to having subjects in the Austinian sense, directed a large army of priests, who were living all over the world, subjects of other sovereigns, yet forming a society, the bulk of whose members professed obedience to himself. Where should this society be placed in the Austinian scheme?

*Note.*—The importance of insisting upon numbers as an element in the conception of an independent political society is greater than may appear on a first view. Small groups of men may live according to one law without much organization. Larger groups almost necessarily imply a high degree of organization, the existence of a type of society with more or less distinct organs for the various purposes of government. Most modern publicists would insist upon a still further element—the possession of a fixed territory. In future notes, the expression State will be generally used in preference to the expression independent political society. For the purposes of Jurisprudence the two expressions may be regarded as identical; and the shorter is the more in accord with usage and convenience.

political society, I will produce and briefly examine a few of the definitions of those notions which have been given by writers of celebrity.

Bentham. 262. Distinguishing *political* from *natural* society, Mr. Bentham, in his Fragment on Government, thus defines the former: 'When a number of persons (whom we may style subjects) are supposed to be in the habit of paying obedience to a person, or an assemblage of persons, of a known and certain description (whom we may call governor or governors), such persons altogether (subjects and governors) are said to be in a state of political society.' And in order to exclude from his definition such a society as the single family conceived of above, he adds a second essential of political society, namely that the society should be capable of indefinite duration.—Considered as a definition of independent political society, this definition is defective. In order that a given society may form a society political and independent, the superior habitually obeyed by the bulk or generality of its members must not be habitually obedient to a certain individual or body: which negative character or essential of independent political society Mr. Bentham has forgotten to notice. And, since the definition in question is a defective definition of independent political society, it is also a defective definition of political society in general. Before we can define political society, or can distinguish political society from society not political, we must determine the nature of those societies which are at once political and independent. For a political society which is not independent is a member or constituent parcel of a political society which is. Or (changing the expression) the powers or rights of subordinate political superiors are merely emanations of sovereignty. They are merely particles of sovereignty committed by sovereigns to subjects.\*

262. Q. It might seem not illogical to say that an independent political society is a species of which political society is the

263. According to the definition of independent political Hobbes. society which is stated or supposed by Hobbes in his excellent treatises on government, a society is not a society political and independent, unless it can maintain its independence, against attacks from without, by its own intrinsic or unaided strength. But if power to maintain its independence by its own intrinsic strength be a character or essential property of an independent political society, the name will scarcely apply to any existing society, or to any of the past societies which occur in the history of mankind. The weaker of such actual societies as are deemed political and independent, owe their precarious independence to positive international morality, and to the mutual fears or jealousies of stronger communities. The most powerful of such actual societies as are deemed political and independent, could hardly maintain its independence, by its own intrinsic strength, against an extensive conspiracy of other independent nations.—Any political society is (I conceive) independent, if it be not dependent in fact or practice: if the party habitually obeyed by the bulk or generality of its members be not in a habit of obedience to a determinate individual or body.

264. In his great treatise on international law, Grotius Grotius. defines sovereignty in the following manner. '*Summa potestas civilis illa dicitur, cujus actus alterius juri non subsunt, ita ut alterius voluntatis humanæ arbitrio irriti possint reddi. Alterius cum dico, ipsum excludo, qui summa potestate utitur; cui voluntatem mutare licet.*' Which definition is thus rendered by his translator and commentator Barbeyrac. '*La puissance souveraine est celle*

genus; and that having once defined the latter it is easy to define the former by the addition of some such test as Austin's negative mark of sovereignty. What is the ground of Austin's insistence upon the contrary?



dont les actes sont indépendans de tout autre pouvoir supérieur, en sorte qu'ils ne peuvent être annulés par aucune autre volonté humaine. Je dis, *par aucune autre volonté humaine*; car il faut excepter ici le souverain lui-même, à qui il est libre de changer de volonté.—Now in order that an individual or body may be sovereign in a given society, two essentials must unite. The *generality* of the given society must render habitual obedience to that certain individual or body: whilst that individual or body must not be habitually obedient to a determinate human superior. But the former and positive essential of sovereign or supreme power is not inserted by Grotius in his formal definition. And the latter and negative essential is stated inaccurately. Sovereign power (according to Grotius) is completely independent of other human power; inasmuch that its acts cannot be annulled by any human will other than its own. But if complete independence be of the essence of sovereign power, there is not in fact the human power to which the epithet *sovereign* will apply with propriety. Every government, let it be never so powerful, renders occasional obedience to commands of other governments. Every government defers frequently to those opinions and sentiments which are styled international law. And every government defers habitually to the opinions and sentiments of its own subjects. If it were not in a habit of obedience to the commands of a determinate party, a government has all the independence which a government can possibly enjoy.\*

264. Q. When Grotius postulates of Sovereignty that its acts cannot be rendered void by the act of any other human will, does he mean void in fact or void in law? Does he mean anything more than that a political authority is supreme when its acts can only be rendered void in law by its own authority?<sup>1</sup>

*Note.—Political and Legal Sovereignty.*—The consideration

<sup>1</sup> Cf. Grotius, "De jure belli ac pacis," Lib. I, Cap. viii, § 7.

265. According to Von Martens of Göttingen, 'a sovereign government is a government which *ought* not to receive commands from any external or foreign government.'—Of the conclusive and obvious objections to this definition of sovereignty the following are only a few.—1. If the definition in question will apply to sovereign governments, it will ~~also~~ apply to subordinate. If a sovereign ought to be free from the commands of foreign governments, so ought every government which is merely the creature of a sovereign, and which holds its powers or rights as a mere trustee for its author. 2. Whether a given government be or be not supreme, is rather a question of fact than a question of international law. A government reduced to subjection is actually a subordinate government, although the state of subjection wherein it is actually held be repugnant to the positive morality which obtains between nations or sovereigns. 3. It cannot be affirmed absolutely of a sovereign or independent government, that it *ought* not to receive commands from foreign or external governments. The intermeddling of independent governments with other independent governments is often repugnant to the morality which actually obtains between nations. But according to

of the foregoing question may serve to reveal a serious flaw in the Austinian theory of sovereignty. As Professor Dicey has remarked, sometimes Austin means by sovereign the legal sovereign, sometimes the political sovereign—the former being determined by reference to law, the latter by reference to fact. "That body is politically sovereign the will of which is ultimately obeyed by the citizens of the State. . . . That body is legal sovereign, in which resides the power of law-making unrestricted by any legal limit."<sup>1</sup> Although practical difficulties may exist in applying this distinction to actual constitutions, the distinction is one of great importance. Austin's failure to grasp it must be remembered. In a treatise on Jurisprudence the term sovereign without qualifying epithet should indicate exclusively the legal sovereign.

that morality which actually obtains between nations (and to that international morality which general utility commends), no independent government ought to be freed completely from the supervision and control of its fellows.

4. In this definition by Von Martens (as in that which is given by Grotius) there is not the shadow of an allusion to the positive character of sovereignty. The definition ~~points~~ at the relations which are borne by sovereigns to sovereigns: but it omits the relations, not less essential, which are borne by sovereigns to their own subjects.

## CHAPTER IV

### FORMS OF GOVERNMENT

266. I have now endeavoured to determine the general Purpose of notion of sovereignty, including the general notion of independent political society. But in order that I may further elucidate the nature or essence of sovereignty, and of the independent political society which sovereignty implies, I will call the attention of my hearers to a few concise remarks upon the following subjects or topics.—1. The various shapes which sovereignty may assume, or the various possible forms of supreme government. 2. The real and imaginary limits which bound the power of sovereigns, and by which the power of sovereigns is supposed to be bounded. 3. The origin of government, with the origin of political society: or the causes of the habitual obedience which is rendered by the bulk of subjects, and from which the power of sovereigns to compel and restrain the refractory is entirely or mainly derived.

267. An independent political society is divisible into two portions: namely, the portion of its members which is sovereign or supreme, and the portion of its members which is merely subject. The sovereignty can hardly reside in *all* the members of a society: for it can hardly happen that some of those members shall not be naturally incompetent to exercise sovereign powers. In most actual societies, the sovereign powers are engrossed by a single member of the whole, or are shared exclusively by a very few of its members: and even in the actual societies whose govern-

ments are esteemed popular, the sovereign number is a slender portion of the entire political community. An independent political society governed by itself, or governed by a sovereign body consisting of the whole community, is not impossible; but the existence of such societies is so extremely improbable, that, with this passing notice, I throw them out of my account.\*

Every  
supreme  
govern-  
ment is a  
*monarchy*  
or an *aris-  
tocracy* (in  
the generic  
sense).

268. Every society political and independent is therefore divisible into two portions: namely, the portion of its members which is sovereign or supreme, and the portion of its members which is merely subject. In case that sovereign portion consists of a single member, the supreme government is properly a *monarchy*, or the sovereign is properly a *monarch*. In case that sovereign portion consists of a number of members, the supreme government may be styled an *aristocracy* (in the generic meaning of the expression).—And here I may briefly remark, that a monarchy or government of one, and an aristocracy or government of a number, are essentially and broadly distinguished by the following important difference. In the case of a monarchy, the sovereign portion of the community is simply or purely sovereign. In the case of an aristocracy, that sovereign portion is sovereign as viewed from one aspect, but is also subject as viewed from another. In the case of an aristocracy, the sovereign number is an aggregate of individuals, and, commonly, of smaller aggregates composed by those individuals. Now, considered collectively, or considered in its corporate character, that sovereign number is sovereign and independent. But, considered severally, the individuals and smaller aggregates composing that sovereign number are

267. The population of the United Kingdom, according to the census of 1901, was 41,454,621. The number of electors upon the register in 1901 was 6,517,719.

subject to the supreme body of which they are component parts.

269. In every monarchy, the monarch renders habitual deference to the opinions and sentiments held and felt by his subjects. But in almost every monarchy, he defers especially to the opinions and sentiments, or he consults especially the interests and prejudices, of some especially influential though narrow portion of the community. Hence it has been concluded, that there are no monarchies properly so called: that every supreme government is a government of a number. This, though plausible, is an error. If he habitually obeyed the *commands* of a determinate portion of the community, either the sovereignty would reside in the mis-called monarch, with that determinate body of his mis-called subjects: or the sovereignty would reside exclusively in that determinate body, whilst he would be merely a minister of the supreme government. For example: In case the corps of Janizaries, acting as an organized body, habitually addressed commands to the Turkish sultan, the Turkish sultan, if he habitually obeyed those commands, would not be sovereign in the Turkish empire. The sovereignty would reside in the corps of Janizaries, with the mis-called sultan or monarch: or the sovereignty would reside exclusively in the corps of Janizaries, whilst he would be merely their vizier or prime minister. But habitual deference to opinions of the community, or to opinions of a portion of the community, consists with that independence which is one of the essentials of sovereignty. If it did not, none of the governments deemed supreme would be truly sovereign; for habitual deference to opinions of the community, or habitual and especial deference to opinions of a portion of the community, is rendered by every aristocracy, or by every government of a number, as well as by every monarch. The habitual independence which is one of the essentials of

sovereignty, is merely habitual independence of laws imperative and proper. By laws which opinion imposes, every member of every society is habitually determined.

Classifica-  
tion of  
aristocra-  
cies (a) by  
reference  
to a nu-  
merical  
ratio.

270. Governments which may be styled aristocracies (in the generic meaning of the expression) are not unfrequently distinguished into the three following forms: namely, *oligarchies*, *aristocracies* (in the specific meaning of the name), and *democracies*. If the proportion of the sovereign number to the number of the entire community be deemed extremely small, the supreme government is styled an oligarchy. If the proportion be deemed small, but not extremely small, the supreme government is styled an aristocracy (in the specific meaning of the name). If the proportion be deemed large, the supreme government is styled popular, or is styled a democracy. But these three forms of aristocracy (in the generic meaning of the expression) can hardly be distinguished with precision, or even with a distant approach to it. A government which one man shall deem an oligarchy, will appear to another a liberal aristocracy: whilst a government which one man shall deem an aristocracy, will appear to another a narrow oligarchy. The proportion, moreover, of the sovereign number to the number of the entire community, may stand, it is manifest, at any point in a long series of minute degrees.\*

270. (c). Is Austin thinking in this section of the political or legal sovereign?

*Note.*—If by sovereign number the legal sovereign be meant, Austin's statement of the classification is defective. In modern politics, it is not the numerical ratio which the legal sovereign bears to the whole community that determines whether the community be democratic, but rather the numerical ratio of the electoral body to the whole community. Moreover, democracy as ordinarily understood implies an active popular interest in government, as well as the existence of such machinery as popular assemblies and the franchise. In other words, usage imposes a material as well as a formal test. It implies, in addition to

271. The distinctions between aristocracies to which I have now adverted, are founded on differences between the proportions which the number of the sovereign body may bear to the number of the community. Other distinctions between aristocracies are founded on differences between the modes wherein the sovereign number may share the sovereign powers. (b) By reference to the modes in which sovereign power is shared.

272. For though the sovereign number may be a homogeneous body, or a body of individual persons whose political characters are similar, it is commonly a mixed or heterogeneous body, or a body of individual persons whose political characters are different. The sovereign number, for example, may consist of an oligarchical or narrower, and a democratical or larger body: of a single individual person styled an emperor or king, and a body oligarchical, or a body democratical; or of a single individual person bearing one of those names, and a body of the former description, with another of the last-mentioned kind. And in any of these cases, or of numberless similar cases, the various constituent members of the heterogeneous and sovereign body may share the sovereign powers in any of infinite modes.

273. The infinite forms of aristocracy which result from those infinite modes, have not been divided systematically into kinds and sorts, or have not been distinguished systematically. Of such aristocracies as are styled limited monarchies.  
manhood suffrage, the existence of a strong public opinion concerning itself with political questions and controlling the course of legislation. Democracy, for the purposes of modern politics, is a political system under which the people rule through chosen representatives, over whom they exercise a real and constant control.<sup>1</sup>

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<sup>1</sup> Cf. Jethro Brown, "The New Democracy," p. 15. For a useful criticism of the Aristotelian classification of governments into one, few, and many, v. Seeley, "Introduction to Political Science," pp. 293-360. On the general question of the classification of governments, an excellent account is given by Professor Burgess, "Political Science and Constitutional Law," II, 1-40.



tematically by generic and specific names. But some of those infinite forms have been distinguished broadly from the rest, and have been marked with the common name of *limited monarchies*.

274. In all or most of the governments which are styled limited monarchies, a single individual shares the sovereign powers with an aggregate or aggregates of individuals: the share of that single individual, be it greater or less, surpassing or exceeding the share of any of the other individuals who are also constituent members of the supreme and heterogeneous body. And by that pre-eminence of share in the sovereign or supreme powers, and (perhaps) by precedence in rank or other honorary marks, that single individual is distinguished, more or less conspicuously, from any of the other individuals with whom he partakes in the sovereignty. But he is not a monarch in the proper acceptation of the term: nor is the mixed aristocracy of which he is the foremost member, a monarchy properly so called. Unlike a monarch in the proper acceptation of the term, that single individual is not a sovereign, but is one of a sovereign number, and lives in a state of subjection.

275. Limited monarchy, therefore, is not monarchy. It is one or another of those infinite forms of aristocracy which result from the infinite modes wherein the sovereign number may share the sovereign powers. And, like any other of those infinite forms, it belongs to one or another of those three forms of aristocracy which I have noticed in a preceding paragraph.

276. As meaning monarchical power limited by positive law, the name *limited monarchy* involves a contradiction in terms. For a monarch properly so called is sovereign or supreme: and, as I shall show hereafter, sovereign or supreme power is incapable of legal limitation, whether it reside in an individual, or in a number of individuals. It is

true that the power of an aristocracy, styled a limited monarchy, is limited by positive morality, and also by the law of God. But, the power of every government being limited by those restraints, the name *limited monarchy*, as pointing to those restraints, is not a whit more applicable to such aristocracies as are marked with it, than to monarchies properly so called.—And as the name is absurd or inappropriate, so is its application capricious. Its application, indeed, is commonly determined by a purely immaterial circumstance: by the nature of the title, or the nature of the name of office, which that foremost member of the mixed aristocracy happens to bear. If he happen to bear a title which commonly is borne by monarchs in the proper acceptation of the term, the supreme government whereof he is a member is usually styled a limited monarchy. Otherwise, the supreme government whereof he is a member is usually marked with a different name. For example: The title of *βασιλεὺς, rex, or king*, is commonly borne by monarchs in the proper acceptation of the term: and since our own king happens to bear that title, our own mixed aristocracy of king, lords, and commons is usually styled a limited monarchy. If his share in the sovereign powers were exactly what it is now, but he were called protector, president, or stadtholder, the mixed aristocracy of which he is a member would probably be styled a republic. And for such verbal differences between forms of supreme government has the peace of mankind been frequently troubled by ignorant and headlong fanatics.

277. To the foregoing brief analysis of the forms of <sup>Incidental</sup> supreme government, I append a short examination of the <sup>topics.</sup> four following topics: for they are far more intimately connected with the subject of that analysis than with any of the other subjects which the scope of my lecture embraces. 1. The exercise of sovereign powers, by a monarch or

sovereign body, through political subordinates or delegates representing their sovereign author. 2. The distinction of sovereign and other political powers, into such as are legislative, and such as are executive or administrative. 3. The true natures of the communities or governments which are styled by writers on positive international law half-sovereign states. 4. The nature of a composite state or a supreme federal government: with the nature of a system of confederated states, or a permanent confederacy of supreme governments.

(1) Delegation.

278. In an independent political society of the smallest possible magnitude, inhabiting a territory of the smallest possible extent, and living under a monarchy or an extremely narrow oligarchy, all the supreme powers brought into exercise (save those committed to subjects as private persons) might possibly be exercised directly by the monarch or supreme body. But by every actual sovereign (whether the sovereign be one individual, or a number or aggregate of individuals), some of those powers are exercised through political subordinates or delegates representing their sovereign author. This is rendered absolutely necessary by innumerable causes. For example, if the number of the society be large, or if its territory be large, the quantity of work to be done in the way of political government is more than can be done by the sovereign without the assistance of ministers. If the society be governed by a popular body, there is some of the business of government which cannot be done by the sovereign without the intervention of representatives; for there is some of the business of government to which the body is incompetent by reason of its own bulk; and some of the business of government the body is prevented from performing by the private avocations of its members.

279. In most or many of the societies whose supreme

governments are monarchical, oligarchical, or aristocratical (in the specific meaning of the name), many of the sovereign powers are exercised by the sovereign directly. This is also the case even in some of the societies whose supreme governments are popular. For example: In all or most of the democracies of ancient Greece and Italy, the sovereign people or number, formally assembled, exercised directly many of its sovereign powers. And in some of the Swiss Cantons whose supreme governments are popular, the sovereign portion of the citizens, regularly convened, performs directly much of the business of government.

280. But in many of the societies whose supreme governments are popular, the sovereign or supreme body (or any numerous body forming a component part of it) exercises through representatives, whom it elects and appoints, the whole, or nearly the whole, of its sovereign or supreme powers. In our own country, for example, one component part of the sovereign or supreme body is the numerous body of *the commons*, who share the sovereignty with the king and the peers, and elect the members of the commons' house. Now the commons exercise through representatives the whole of their sovereign powers, except their sovereign power of electing and appointing representatives to represent them in the British Parliament.

281. Where a sovereign body (or any smaller body forming a component part of it) exercises through representatives the whole of its sovereign powers, it may delegate those its powers to those its representatives, in either of two modes. 1. It may delegate those its powers to those its representatives, subject to a trust or trusts. 2. It may delegate those its powers to those its representatives, absolutely or unconditionally: inasmuch that the representative body, during the period for which it is elected and appointed, is invested completely with the sovereign character of the latter.

Delegation subject to a trust.

282. For example : The commons delegate their powers to the members of the commons' house, in the second of the above-mentioned modes. During the period for which those members are elected, or during the parliament of which those members are a limb, the sovereignty is possessed by the king and the peers, with the members of the commons' house, and not by the king and the peers, with the delegating body of the commons. The powers of the commons are delegated so absolutely to the members of the commons' house, that this representative assembly might concur with the king and the peers in defeating the principal ends for which it is elected and appointed. It might concur, for instance, in making a statute which would lengthen its own duration from seven to twenty years; or which would annihilate completely the actual constitution of the government, by transferring the sovereignty to the king or the peers from the tripartite body wherein it resides at present.

283. But though the commons delegate their powers in the second of the above-mentioned modes, it is clear that they might delegate them subject to a trust or trusts. The representative body, for instance, might be bound to use those powers consistently with specific ends pointed out by the electoral: or it might be bound, more generally and vaguely, not to annihilate, or alter essentially, the actual constitution of the supreme government. Where such a trust is imposed by a sovereign or supreme body (or by a smaller body forming a component part of it), the trust is enforced by legal, or by merely moral sanctions. The representative body is bound by a positive law or laws: or it is merely bound by a fear that it may offend the bulk of the community, in case it shall break the engagement which it has contracted with the electoral.

284. And here I may briefly remark, that this last is the position which really is occupied by the members of

the commons' house. Adopting the language of most of the writers who have treated of the British Constitution, I commonly suppose that the king and the lords, with the members of the commons' house, form a tripartite body which is sovereign or supreme. But, speaking accurately, the members of the commons' house are merely trustees for the body by which they are elected and appointed: and, consequently, the sovereignty always resides in the king and the peers, with the electoral body of the commons. That a trust is imposed by the party delegating, and that the party representing engages to discharge the trust, seems to be imported by the correlative expressions *delegation* and *representation*. It were absurd to suppose that the delegating empowers the representative party to defeat or abandon any of the purposes for which the latter is appointed: to suppose, for example, that the commons empower their representatives in parliament to relinquish their share in the sovereignty to the king and the lords.—The supposition that the powers of the commons are delegated absolutely to the members of the commons' house probably arose from the following causes. 1. The trust imposed by the electoral body upon the body representing them in parliament, is tacit rather than express: it arises from the relation between the bodies as delegating and representative parties, rather than from oral or written instructions given by the former to the latter. But since it arises from that relation, the trust is general and vague. The representatives are merely bound, generally and vaguely, to abstain from any such exercise of the delegated sovereign powers as would tend to defeat the purposes for which they are elected and appointed. 2. The trust is simply enforced by moral sanctions. In other words, that portion of constitutional law which regards the duties of the representative towards the electoral body, is positive morality merely. Nor is this extraordinary. For (as I shall show hereafter) all

constitutional law, in every country whatever, is, as against the sovereign, in that predicament: and much of it, in every country, is also in that predicament, even as against parties who are subject or subordinate to the sovereign, and who therefore might be held from infringing it by legal or political sanctions.'

(2) Legis-  
lative v.  
executive  
Powers.

285. From the exercise of sovereign powers by the sovereign directly, and also by the sovereign through political subordinates or delegates, I pass to the distinction of sovereign, and other political powers, into such as are *legislative*, and such as are *executive* or *administrative*.

286. It seems to be supposed by many writers, that legislative political powers, and executive political powers, may be distinguished precisely, or, at least, with an approach to precision: and that in every society whose government is a government of a number, or, at least, in every society

284. Sections 278-84 raise several difficulties with respect to sovereignty in Great Britain. First we are told that the sovereign is the King, Lords, and the electorate of the Commons. Afterwards we are told that, during the continuance of Parliament, the King and Parliament are sovereign. Again, after having been told that the electorate delegates its powers unconditionally, we are informed subsequently that the delegation is subject to a trust. The explanation of these contradictions may be found, partly in the confusion of political and legal sovereignty, and partly in a reluctance on Austin's part to admit that sovereignty, the possession of which he regards as an essential characteristic of an independent political society, could ever be in abeyance. To-day it will be generally conceded that, whilst political sovereignty may be an abiding fact, its organization in the form of the legal sovereign may be in abeyance. According to the existing theory of the British Constitution, true or legal sovereignty undoubtedly resides in the King and Parliament.<sup>1</sup> The only way in which the abeyance of sovereignty can be avoided is to attribute sovereignty to the State itself, an attribution towards which legal theory is slowly tending, but which is in advance of existing orthodoxy.<sup>2</sup>

<sup>1</sup> Cf. Professor Dicey, "Law of the Constitution," 5th ed., pp. 37-81.

<sup>2</sup> Cf. *infra* Excursus A and B.

whose government is a limited monarchy, the legislative sovereign powers, and the executive sovereign powers, belong to distinct parties. For example, according to Sir William Blackstone, the legislative sovereign powers reside in the parliament: that is to say, in the tripartite sovereign body formed by the king, the members of the house of lords, and the members of the house of commons. But, according to the same writer, the executive sovereign powers reside in the king alone.

287. Now the distinction of political powers into such as are legislative, and such as are executive, scarcely coincides with the distinction of those powers into such as are supreme and such as are subordinate: for it is stated or assumed by the writers who make the former distinction, that sovereign political powers (and, indeed, subordinate also) are divisible into such as are legislative and such as are executive. If the distinction of political powers into legislative and executive have any determinate meaning, it must be this: The former are powers of establishing laws, and of issuing other commands: whilst the latter are powers of administering, or of carrying into operation, laws or other commands already established or issued. But the distinction, as thus understood, is far from approaching to precision. For of all the instruments or means by which laws and other commands are administered or executed, laws and other commands are incomparably the most frequent: insomuch that most of the powers deemed executive or administrative are themselves legislative powers, or involve powers which are legislative. For example: Laws are mainly administered by courts of justice through judgments or decrees which are often themselves laws proper.

288. That the legislative sovereign powers, and the executive sovereign powers, belong, in any society, to distinct parties, is a supposition too palpably false to endure



a moment's examination. Of the numerous proofs of its falsity which it were easy to produce the following will more than suffice.—1. Of the laws or rules made by the British parliament, or by any supreme legislature, many are subsidiary, and are intended to be subsidiary, to the due execution of others. And as making laws or rules subservient to that purpose, it is not less executive than courts of justice as making regulations of procedure.—2. In almost every society, judicial powers, commonly esteemed executive or administrative, are exercised directly by the supreme legislature. For example: The Roman emperors or princes, who were virtually sovereign in the Roman empire or world, not only issued the edictal constitutions which were general rules or laws, but, as forming the highest or ultimate tribunal of appeal, they also issued the particular constitutions which were styled decrees or judgments. *In libera republica*, or before the virtual dissolution of the free or popular government, the sovereign Roman people, then the supreme legislature, was a high court of justice for the trial of criminal causes. The powers of supreme judicature inhering in the modern parliament, or the body formed by the king and the upper and lower houses, have ever (I believe) been dormant, or have never been brought into exercise: for, as making the particular but *ex post facto* statutes which are styled acts of attainder, it is not properly a court of justice. But the ancient parliament, formed by the king and the barons, of which the modern is the offspring, was the ultimate court of appeal as well as the sovereign legislature.—3. The present British constitution affords not the slightest countenance to the supposition which I am now examining. It is absurd to say that the parliament has the legislative sovereign powers, but that the executive sovereign powers belong to the king alone. If the parliament (as Blackstone affirms) be sovereign or absolute, every sovereign

power must belong to that sovereign body, or to one or more of its members as forming a part or parts of it. The powers of the king considered as detached from the body, or the powers of any of its members considered in the same light, are not sovereign powers, but are simply or purely subordinate, or (changing the phrase) if the king or any of its members, considered as detached from the body, be invested with political powers, that member as so detached is merely a minister of the body, or those political powers are merely emanations of its sovereignty. Besides, political powers which surely may be deemed executive are exercised by each of the houses. For example, in civil causes, the house of lords is the ultimate court of appeal. And the political powers exercised by the king which surely may be deemed legislative, are of vast extent and importance. As captain general, for example, he makes articles of war: that is to say, laws which regard especially the discipline or government of the soldiery. As administering the law, through subordinate courts of justice, he is the author of the rules of procedure which they have established avowedly, or in the properly legislative mode: and (what is of greater importance) he is the author of that measureless system of judge-made rules of law, or rules of law made in the judicial manner, which has been established covertly by those subordinate tribunals as directly exercising their judicial functions.

288. Austin's treatment of the division of governmental powers into legislative, executive, and judicial, has been subjected to severe criticism. The subject is closely related to some topics already discussed. In the note to Section 60, reference was made to the distinction between general and particular commands—a distinction suggesting, though not identical with, that between legislative and executive action. In the note to Section 157, I referred to the distinction between positive laws and the general commands which are enforced by the State merely as incidental to the practical application of positive laws. In the present place the

289. Of all the larger divisions of political powers, the division of those powers into *supreme* and *subordinate* is perhaps the only precise one. The former are the political powers, infinite in number and kind, which, partly brought into exercise, and partly lying dormant, belong to a sovereign

following topics deserve consideration: the differentiation between legislative, executive, and judicial functions; the need for a corresponding differentiation between governmental organs; the imperfections of the latter differentiation in existing constitutions; and the relation of the legislature to the executive in the British Constitution.

(1) *The differentiation between legislative, executive, and judicial functions.*—The differentiation was developed by Aristotle, from whose remarks upon the subject several interesting passages may still be quoted with advantage: "Every polity consists of three departments, and a good legislator is bound to consider what is expedient to particular politics in respect of each. . . . The first of the three points is the nature of the body which deliberates on affairs of State; secondly, the nature of the Executive, i.e. the offices to be created, the extent of their jurisdiction, and the right system of election; and thirdly, the nature of the judicial body. . . . The deliberative body is supreme in all questions of war and peace, the formation and dissolution of alliances, the enactment of laws, sentences of death, exile, and confiscation; to it belongs the election of the officers of State, and to it they are responsible at the expiration of their term of office. . . . It is not an easy matter at the outset to determine the character of the positions which are described as offices of State. For there are many mere superintendents necessary to the political association, and, *as these are certainly not officers of State*, it is not correct to regard all functionaries appointed either by suffrage or lot as officers. . . . Some offices of superintendence are political, whether the superintendence is over all the citizens in respect of a particular function, as, e.g. the superintendence of a general in the field of battle, or departmental, like that of a censor of women or boys. Others again are economic—it is a common thing, e.g. to elect inspectors of weights and measures—and others again simply menial, to which people, if they are wealthy, appoint slaves. . . . In large States it is equally possible and right to have a single office appointed to a single work. . . . In small States on the other hand . . . there is no reason why several functions should not be assigned to the same persons, for they will not be any impediment to one another, and in view of the scanty population

or state. The latter are those portions of the supreme powers which are delegated to political subordinates: such political subordinates being subordinate merely, or also immediate partakers in the supreme powers.

it is necessary to constitute the offices on the principle of spit-candlesticks."<sup>1</sup>

Suggestive discussions of the division of governmental functions will be found in the works of Locke, Rousseau, and Montesquieu. Rousseau contended that the State contains two powers—the will or legislative power, and physical force or executive power. “La loi veut, le roi fait.”<sup>2</sup> Montesquieu developed the position that the differentiation of function demanded, in the interests of security and freedom, a corresponding differentiation of organ.<sup>3</sup> Among modern definitions, the most famous is that of the great American, Marshall, C. J.: “The distinction between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law.”<sup>4</sup>

(2) *The need for a corresponding differentiation of organs.*—Austin, while not denying the distinction between legislative, executive, and judicial functions, criticizes the view that the distinction involves a corresponding distinction of State organs. The sovereign, he holds, is one and undivided. Had he grasped the distinction between the State (with its organization as the legal sovereign) and the Government, he would have realized the possibility of constitutions wherein an almost complete division of governmental powers might co-exist with an undivided sovereignty. Even with regard to constitutions in which the distinction between the legal sovereign and the government is not apparent, some differentiation of governmental organs has been invariably realized. The reason for the differentiation has been stated to be the prevention of tyranny—an explanation not without historical basis. But apart from the danger of tyranny, the differentiation of organs is justified by considerations of governmental efficiency. It is an application of the great principle of the division of labour. The functions of the legislator, governmental official, and judge are so distinct that success in one department is no proof of capacity in another. The work in each department will be the better done if undertaken by distinct

<sup>1</sup> Weldon, “The Politics of Aristotle,” pp. 293-300.

<sup>2</sup> “Le Contrat Social,” III, I., cf. Locke, “Second Treatise on Government,” §§ 143-8.

<sup>3</sup> “L’esprit des Lois” (“La Constitution d’Angleterre”), XI, 6.

<sup>4</sup> Cooley’s “Constitutional Limitations,” 5th ed., p. 109.

(3) *Half  
Sovereign  
States.*

290. There were formerly in Europe many of the communities or governments which are styled by writers on positive international law *half sovereign states*. In consequence of the mighty changes wrought by the French revo-

persons. The increasing complexity of modern States, while it makes the fact more obvious, also serves to create a demand for hitherto unrecognized forms of differentiation. Thus Mill advocated the creation of a small and select body which should form a sort of Legislative Commission empowered to make laws under Parliamentary control. The importance of at least maintaining the existing degree of differentiation is attested by the fact that modern politics everywhere accept it. It is made the basis of the Constitution of the Australian Commonwealth—a Constitution which expresses the ideals of a Constitutional Assembly convened in the closing years of the nineteenth century under conditions which afforded a unique opportunity for the achievement of great constitutional results. The Constitution distributes the powers of the Commonwealth government in a manner sufficiently indicated by the following sections:—

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives,

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth.

61. The executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.<sup>1</sup>

(3) *The differentiation of organs incompletely realized in existing constitutions.*—Even if it were possible to draw a hard and

<sup>1</sup> Cf. Moore, "The Commonwealth of Australia," chap. v; Jethro Brown, "The New Democracy," Appendix A.

lution, such communities or governments have wholly or nearly disappeared: and I advert to the true natures of such communities or governments, not because they are intrinsically of any importance, but because the incongruous

fast line between legislative, executive, and judicial functions, it would be folly to expect the differentiation of organs to be correspondingly precise. Government is a highly practical matter, and the distribution of governmental functions must be determined by practical considerations. If an organ, adapted to fulfil functions of a particular kind, can discharge certain other functions incidental to the former more advantageously than any other organ in the community, there is no reason why it should not be permitted to do so. Even when, as in the case of the Australian Constitution, men start with a clean slate, they know from experience that it is wise to proceed cautiously, and often to accept a somewhat illogical arrangement which has stood the test of time rather than gratify a passion for symmetry. If the Anglo-Saxon has carried his timidity in this respect to excess, he need not be wholly ashamed of the results. "On juristic elegance," as Professor Maitland has remarked, "we do not pride ourselves, but we know how to keep the roof weather-tight." In all constitutions, however, the differentiation of governmental organs is far from being clearly marked. The doctrine of the separation of powers implies the exercise of governmental functions by different persons who are mutually independent. In the first place, we do not find a clear and precise distinction of personnel. Under the British Constitution, for example, judges make laws directly by laying down rules for the conduct of judicial business, and indirectly by establishing precedents from which rules of law are inferred; the Legislature exercises judicial functions where its own privileges are in question; the Executive exercises certain powers of subordinate legislation incidental to the conduct of administration, not merely with respect to the public service, but also in special cases with respect to the community generally. None of these cases may be inevitable; most of them, or something like them, will be found to be actual in modern constitutions. In the second place, not only is there no clear and precise distinction of personnel, but there is nowhere realized that entire mutual independence as between the different organs of government which may be characterized as predominantly legislative, executive, or judicial. Such independence might well be construed as a denial of the unity of the State. Even where there exists behind the various governmental powers a true sovereign distinct from them and capable of settling their differences by revision of the constitu-

epithet *half* or *imperfectly sovereign* obscures the essence of sovereignty and independent political society. It seems to import that the governments marked with it are sovereign and subject at once.

291. According to writers on positive international law, a government half or imperfectly sovereign occupies the following position.—In spite of its half or imperfect dependence, it has most of the political and sovereign powers which belong to a government wholly or perfectly supreme. More

tion, a complete mutual independence is lacking for the reason that the sovereign behind the governments is simply an extraordinary legislature. The United States approaches most nearly to complete mutual independence. The executive and judicial powers, equally with the (normal) legislative powers, are there derived from the Constitution and claim to be on a similar footing with regard to it. Although all three are subject to the sovereign or extraordinary legislature provided by the fifth section of the Constitution, the mutual independence of governmental powers is realized more nearly than elsewhere, and perhaps more nearly than can be justified by expediency. An interesting illustration of the extent to which the doctrine of separation is carried, may be found in the fact that a declaratory statute, in so far as it may be intended to have a retrospective effect upon vested rights, is held to be invalid as an unlawful assumption of judicial power.<sup>1</sup>

(4) *The relation of the Executive to the legislature in the British Constitution.*—Sir W. R. Anson comments adversely upon Austin's criticism of Blackstone, and contends that there is a dualism in the British Constitution. "The Crown, through its ministers, does the acts of State; the Crown, in Parliament, enacts laws. . . . The picture which Austin presents of a legislature issuing commands which alone inspire the action of the executive is remote from fact."<sup>2</sup> It appears to me that an executive may be *subordinate* to the legislature, though possessed of important powers of initiative, and that the theory of the British Constitution requires us to differentiate between the king in his two capacities—to hold that the king as head of the executive is subordinate to the king as a member of the supreme legislature. My reasons for preferring this view will be stated in the note to Section 333.

<sup>1</sup> Cf. Black, "Interpretation of Law," pp. 371-2.

<sup>2</sup> "Law of the Constitution," 3rd ed., I, 39-41.

especially, in all or most of its foreign relations, it acts and is treated as a perfectly sovereign government, and not as a government in a state of subjection to another: insomuch that it makes and breaks alliances, and makes war or peace, of its own discretion. But, this notwithstanding, the government, or a member of the government, of another political society, has political powers over the society deemed imperfectly independent. For example: In the Germanico-Roman or Romano-Germanic empire, the particular German governments depending on the empire immediately, or holding of the emperor by tenure *in capite*, were deemed imperfectly sovereign in regard to that general government which consisted of the emperor and themselves as forming the Imperial Diet. For though in their foreign relations they were wholly or nearly independent, they were bound (in reality or show) by laws of that general government: and its tribunals had appellate judicature (substantially or to appearance) over the political and half independent communities wherein they were half supreme. Most, indeed, of the governments deemed imperfectly supreme, are governments which in their origin had been substantially vassal: but which had insensibly escaped from most of their feudal bonds, though they still continued apparently in their primitive state of subjection.

292. Now I think it will appear on analysis, that every government deemed imperfectly supreme is really in one or another of the three following predicaments. It is perfectly subject: Or it is perfectly independent: Or in its own community it is jointly sovereign with another government, and is therefore a constituent member of a government supreme and independent.—1. The political powers of the government deemed imperfectly supreme, may be exercised entirely and habitually at the pleasure and bidding of the other. On which supposition its so-called half sovereignty is merely



nominal and illusive.—2. The political powers exercised over the society deemed imperfectly independent, may be exercised through its own permission. On which supposition, the government deemed imperfectly supreme is of itself a truly sovereign government: those powers being legal rights over its own subjects, which it grants expressly or tacitly to another sovereign government. For example: The great Frederic of Prussia, as prince-elector of Brandenburg, was deemed half or imperfectly sovereign in respect of his feudal connection with the German empire. Potentially and in practice, he was thoroughly independent of the Imperial government: and, supposing it exercised political powers over his subjects of the electorate, it virtually exercised them through his authority, and not through his obedience to its commands. Being in a habit of thrashing its armies, he was not in a habit of submission to his seeming feudal superior.—3. The political powers of the government deemed imperfectly supreme, may not be exercised entirely and habitually at the pleasure and bidding of the other: but yet its independence of the other may not be so complete, that the political powers exercised by the other over the political society deemed imperfectly independent, are merely exercised through its permission or authority. For example: We may suppose that the elector of Bavaria was independent of the Imperial government, in all or most of his foreign, and in most of his domestic relations: but that, this his independence notwithstanding, he could not have abolished completely, without incurring considerable danger, the appellate judicature of the Imperial tribunals over the Bavarian community. But on the supposition which I have now stated and exemplified, the sovereignty of the society deemed imperfectly independent resides in the government deemed imperfectly supreme together with the other government: and, consequently, the government deemed imper-

fectly supreme is properly a constituent member of a government supreme and independent.

293. For the reasons produced and suggested in the course of the foregoing analysis, I believe that no government is sovereign and subject at once: that no government can be styled with propriety *half* or *imperfectly supreme*.

294. Before I dismiss the riddle which I have now endeavoured to resolve, I must state or suggest the following difference.—In numberless cases, political powers are exercised over a political community, by the government, or a member of the government, of an external political community. But the government of the former community is scarcely denominated half or imperfectly sovereign, unless the government of the latter, or the member of the government of the latter, possess those political powers as being the government of the latter, or as being a member of its government. For example: Though the king of the British Islands is also king of Hanover, he is not king in either country as being king in the other. The powers which he exercises there, have no dependence whatever on his share in the sovereignty here: nor have the powers which he exercises here, any dependence on his sovereignty (or his share in the sovereignty) there.\*

294. Q. (1) Is Austin thinking of political or legal sovereignty in sections 291-4?

(2) Suggest examples of joint sovereignty (Case 3).

(3) Is the admission of the possibility of a joint sovereign consistent with the doctrine that sovereignty is one and indivisible?

*Note.*—A casual reader may not realize at a first glance the precise meaning of Austin's criticism of the term *semi-sovereign*. I propose (1) to develop and illustrate the criticism, (2) to examine its value.

(1) Austin held that sovereignty implies supremacy, and that we can no more speak of half-sovereignty than we can speak of half-supremacy. The expression involves a *contradictio in adjecto*; a government of a particular political community may be

(4) Supreme federal government, 295. It frequently happens that one government political and sovereign arises from a federal union of several political governments. By some of the writers on positive inter-

half of the sovereign, but it cannot be half-sovereign; sovereignty is an attribute of the whole, not of the parts. The most difficult of the three cases suggested by Austin is the case of joint possession of sovereign powers. Here the so-called semi-sovereign state is one of which a part of the sovereign body is external, not, in the Austinian view, to the State itself, for then the State would be no true State, but to the local government. The State in such a case is composed of the subjects who are local, and a sovereign body which is partly local and partly foreign. Two examples may be suggested.

By the Treaty of Berlin, 1878, Bulgaria was placed under the suzerainty of Turkey. As regards domestic affairs, its powers were almost unlimited, except that the Prince chosen by the Bulgarian people must be also accepted by Turkey and approved by the powers signatory to the Treaty. As regards external relations, the limitations were more serious. Bulgaria might receive, but could not accredit, diplomatic and consular agents. It could not make a treaty or declare war save through the mediation of Turkey.

According to the constitution of the United Republic of the Ionian Islands, established in 1815 under the protectorate of Great Britain, "the head of the Government was appointed by England, the whole of the executive authority was practically in the hands of the protecting power, and the State was represented by it in its external relations. In making treaties, however, Great Britain did not affect the Ionian Islands unless it expressly stipulated in its capacity of protecting power; the vessels of the republic carried a separate trading flag; the State received consuls, though it could not accredit them; and during the Crimean War it maintained a neutrality, the validity of which was acknowledged in the English courts."<sup>1</sup>

The case last mentioned is extremely interesting. How would Austin have dealt with it? Although the Ionian Republic was not a part of the British Empire, its local government was not independent. It might be contended that the powers of the British Government were exercised through permission of the Republic, and that the Republic was therefore a sovereign state. More probably Austin would have considered the case to be one of joint-sovereignty.

Mr. Robert Campbell quotes as an illustration of joint-sover-

<sup>1</sup> Hall, "International Law," 2nd ed., pp. 28-9.

national law, the sovereign government of such a society is and a styled a *composite state*. But it might be styled more aptly system of a *supreme federal government*. confederated states.

eighty the British colonies "which possess independent legislatures."<sup>1</sup> The illustration is not a happy one. British colonies are not included by writers of International Law under the head of semi-sovereign states; they are integral parts of the British Empire; and the complete legal sovereignty of the British Parliament is attested *inter alia* by the fact that an Imperial Act intended to apply to a colony will be held to apply to it notwithstanding anything to the contrary in the local law. In the recent Constitution for the Australian Commonwealth, the legislative supremacy of the Imperial Parliament remains with slight alterations, which may affect the occasions on which that supremacy is displayed, but leave its existence unchallenged.<sup>2</sup>

(2) I turn from illustrating Austin's criticism to examine its value. Austin denies the possibility of an imperfectly sovereign state on the ground that in every political community unlimited control must exist somewhere. I hold, on the contrary, that even if it be true that such a control always exists, the epithet imperfectly sovereign would not be applied inappropriately where the control is partly external to the State. If, in support of the Austinian view, it be urged that the control is *not* external to the State since in such cases the State consists of the political community together with the external authority, I reply that this is to give an artificial and improper meaning to the term State. In the case of a State like the Ionian Republic, it is within the State itself that we must look for the organic element implied in the very idea of the State. The protected State is, unlike subordinate political communities, no part of a larger whole. It is a real unit; it is a person in International Law; it enjoys an imperfect independence; and as a consequence it is styled not inappropriately an imperfectly sovereign state. Its real position is analogous to the position assigned by positive law to the ward. We regard the ward as a person of imperfect independence; we do not affirm the existence of a perfectly independent person by including within the conception of the personality of the ward some share of the personality of the guardian.

In taking a different view, Austin sacrifices essentials to verbal precision. In reality, States are the creation, not of logic, but of history. We find them in every stage of being, becoming and

<sup>1</sup> "The Student's Austin," p. 101.

<sup>2</sup> Cf. Moore, "The Commonwealth of Australia," p. 167.

296. It also frequently happens, that several political societies which are severally independent, or several political governments which are severally sovereign, are compacted by a permanent alliance. By some of the writers on positive

ceasing to be. Whatever tests we may apply, we must always remember that the first function of a classification is to represent facts; that if facts are infinitely varying, the classification must not be inflexible. If we find that between the political community which is an independent State, and the political community which is only a part of an independent State, there are other political communities more nearly allied to the former than to the latter, I do not see why we should allow any abstract doctrine of sovereignty to prevent us from applying to such states the obvious epithet of imperfectly independent, or even imperfectly sovereign. As Pradier-Fodéré remarked, metaphysically there ought not to be half-sovereign States, but historically there have been, and there may be again.<sup>1</sup> In refusing to recognize the fact Austin is unhistorical. Further, he endeavours to force upon the very diverse material with which the International lawyer is called upon to deal, a generalization suggested by a science avowedly limited to highly developed States. The actual facts as they appear in International Law are well summarized by Dr. Merriam: "When a State asks for admission to the circle of sovereigns, the International lawyer inquires first of all into the political powers which the applicant possesses. In other words, sovereignty is really regarded as a sum of powers, a collection or aggregate of governmental faculties, the possession of which will entitle the bearer to recognition in a sovereign capacity. Those powers are of such a nature as that of making war and concluding peace, of negotiating treaties with other powers, of regulating the internal administration, and of independent legislation. For the purposes of International Law, sovereignty is regarded as the aggregate of these powers, rather than as an indivisible principle out of which they all emanate. Hence, being a sum or mass of rights, a part may be taken away without wholly destroying the sovereignty. The sovereignty may be less perfect, but it is still sovereignty."<sup>2</sup>

In venturing to differ from Austin as to the propriety of the expression imperfectly sovereign State, I may remind the reader that my criticism involves no attack upon the general question

<sup>1</sup> "Traité de droit international public," I, 159; cited Merriam, "History of the Theory of Sovereignty," p. 22.

<sup>2</sup> "History of Theory of Sovereignty," p. 213.

international law, the several societies or governments are styled a *system of confederated states*. But the several governments, considered as thus compacted, might be styled more aptly a *permanent confederacy of supreme governments*.

297. I advert to the nature of a composite state, and to that of a system of confederated states, for the following purposes. In a political society styled a composite state, the sovereignty is so shared by various individuals or bodies, that the *one* sovereign body whereof they are the constituent members, is not conspicuous and easily perceived. Accordingly, I advert to the nature of a supreme federal government, to show that the society which it rules is ruled by one sovereign. And adverting to the nature of a composite state, I also advert to the nature of a system of confederated states. For the fallacious resemblance of those widely

of the tenability of the Austinian doctrine of sovereignty for the purposes of a jurisprudence exclusively concerned with fully developed states.<sup>1</sup> I ought also to add that Austin might have quoted high authorities on International Law in his favour, and that even to-day eminent writers are apparently prepared to defend his terminology from the point of view of Political Science. The sections from Austin, at present under discussion, are quoted almost verbatim, and with apparent approval, by Professor Willoughby.<sup>2</sup> Professor Burgess, having defined Sovereignty as original, absolute, unlimited, universal power over the individual subject and over all associations of subjects, says that Sovereignty is absolutely essential to the State, and is either entire or not at all.<sup>3</sup> The position is not apparently distinguishable from Austin's so far as relates to the subject immediately under consideration. With both, the State subject to a joint-sovereignty must either not be called a State at all, or else be included within the circle of States by means of an artificial extension of its borders so as to include an external government. My own reasons for dissenting from this view will appear more fully in the discussion on Sovereignty in Excursus B.

<sup>1</sup> Cf. Excursus A.

<sup>2</sup> "Nature of the State," pp. 256-7.

<sup>3</sup> "Political Science and Constitutional Law," I, 52-5; II, 7.

different objects, tends to produce a confusion which I think it expedient to obviate.

298. (1) In the case of a *composite state*, or a *supreme federal government*, the several united governments of the several united societies, together with a government common to those several societies, are jointly sovereign in each of those several societies, and also in the larger society arising from the federal union. Or, since the political powers of the common or general government were relinquished and conferred upon it by those several united governments, the nature of a composite state may be described more accurately thus. As compacted by the common government which they have concurred in creating, and to which they have severally delegated portions of their several sovereignties, the several governments of the several united societies are jointly sovereign in each and all.

299. It will appear on a moment's reflection, that the common or general government is not sovereign or supreme. A government supreme and federal, and a government supreme but not federal, are merely distinguished by the following difference. Where the supreme government is not federal, each of the several governments, considered in that character, is purely subordinate: or none of the several governments, considered in that character, partakes of the sovereignty. But where the supreme government is properly federal, each of the several governments, *which were immediate parties to the federal compact*, is, in that character, a limb of the sovereign body. Consequently, although they are subject to the sovereign body of which they are constituent members, those several governments, even considered as such, are not purely in a state of subjection.—But since those several governments, even considered as such, are not purely in a state of subjection, the common or general government which they have concurred in creating is not sovereign or supreme.

301. Nor is any of those several governments sovereign or supreme, even in the society of which it is the immediate chief. If those several governments were severally sovereign, they would not be members of a composite state: though, if they were severally sovereign, and yet were permanently compacted, they would form (as I shall show immediately) a system of confederated states.

302. To illustrate the nature of a composite state, I will add the following remark to the foregoing general description.—Neither the immediate tribunals of the common or general government, nor the immediate tribunals of the several united governments, are bound, or empowered, to administer or execute *every* command that the general government may issue. The political powers of the common or general government, are merely those portions of their several sovereignties, which the several united governments, as parties to the federal compact, have relinquished and conferred upon it. Consequently, its competence to make laws and to issue other commands, may and ought to be examined by its own immediate tribunals, and also by the immediate tribunals of the several united governments. And if, in making a law or issuing a particular command, it exceed the limited powers which it derives from the federal compact, all those various tribunals are empowered and bound to disobey.—And since each of the united governments, as a party to the federal compact, has relinquished a portion of its sovereignty, its competence to make laws and to issue other commands, may and ought to be examined by all those tribunals. And if it enact a law or issue a particular command, as exercising the sovereign powers which it has relinquished by the compact, all those tribunals are empowered and bound to disobey.

303. If, then, the general government were of itself sovereign, or if the united governments were severally



sovereign, the united societies would not constitute one composite state. The united societies would constitute one independent society, with a government supreme but not federal; or a knot of societies severally independent, with governments severally supreme. Consequently, the several united governments as forming one aggregate body, or they and the general government as forming a similar body, are jointly sovereign in each of the united societies, and also in the larger society arising from the union of all.

304. Now since the political powers of the common or general government are merely delegated to it by the several united governments, it is not a constituent member of the sovereign body, but is merely its subject minister. Consequently, the sovereignty of each of the united societies, and also of the larger society arising from the union of all, resides in the united governments *as forming one aggregate body*: that is to say, as signifying their joint pleasure, or the joint pleasure of a majority of their number, agreeably to the modes or forms determined by their federal compact. By that aggregate body, the powers of the general government were conferred and determined: and by that aggregate body, its powers may be revoked, abridged, or enlarged.—To that aggregate body, the several united governments, though not merely subordinate, are truly in a state of subjection.

305. The supreme government of the United States of America, agrees (I believe) with the foregoing general description of a supreme federal government. I believe that the common government, or the government consisting of the congress and the president of the United States, is merely a subject minister of the United States' governments. I believe that none of the latter is properly sovereign or supreme, even in the state or political society of which it is the immediate chief. And, lastly, I believe that the sovereignty of each of the states, and also of the larger

state arising from the federal union, resides in the states, governments *as forming one aggregate body*: meaning by a state's government, not its ordinary legislature, but the body of its citizens which appoints its ordinary legislature, and which, the union apart, is properly sovereign therein.

306. (2) A *composite state*, and a *system of confederated states*, are broadly distinguished by the following essential difference. In the case of a composite state, the several united societies are one independent society, or are severally subject to one sovereign body: which, through its minister the general government, and through its members and ministers the several united governments, is habitually and generally obeyed in each of the united societies, and also in the larger society arising from the union of all. In the case of a system of confederated states, the several compacted societies are not one society, and are not subject to a common sovereign. Though the aggregate of the several governments was the framer of the federal compact, and may subsequently pass resolutions concerning the entire confederacy, neither the terms of that compact, nor such subsequent resolutions, are enforced in any of the societies by the authority of that aggregate body. To each of the confederated governments, those terms and resolutions are merely articles of agreement which it spontaneously adopts: and they owe their legal effect, in its own political society, to laws and other commands which it makes or fashions upon them, and which, of its own authority, it addresses to its own subjects. In short, a system of confederated states is not essentially different from a number of independent governments connected by an ordinary alliance. So long as we abide in general expressions, we can only affirm generally and vaguely, that the compact of the former is intended to be permanent, whilst the alliance of the latter is commonly intended to be temporary: and that the ends or

purposes which are embraced by the compact, are commonly more numerous, and are commonly more complicated, than those which the alliance contemplates.

307. I believe that the German Confederation, which has succeeded to the ancient Empire, is merely a system of confederated states. I believe that the present Diet is merely an assembly of ambassadors from several confederated but severally independent governments: that the resolutions of the Diet are merely articles of agreement which each of the confederated governments spontaneously adopts: and that they owe their legal effect, in each of the compacted communities, to laws and commands which are fashioned upon them by its own immediate chief.

308. I also believe that the Swiss Confederation was and is of the same nature. If, in the case of the German, or of the Swiss Confederation, the body of confederated governments enforces its own resolutions, those confederated governments are one composite state, rather than a system of confederated states. The body of confederated governments is properly sovereign: and to that aggregato and sovereign body, each of its constituent members is properly in a state of subjection.\*

308. Q. (1) Distinguish the "state" which is member of a Federation from—

(a) The State called imperfectly sovereign, e.g. the Ionian Republic.

(b) The Colonial dependency, e.g. Canada.

(c) An English borough.

(2) Austin makes the distinction between the "State," which is a member of a Federal State, and the State, which is member of a Confederation, turn upon the possession of sovereignty. Members of a Confederation, however, may lose by insensible degrees their sovereignty, and so become a Federation; and vice versa. Can any practical tests be suggested for deciding in such cases at what moment sovereignty by the member of the union is lost or acquired?

*Note.*—In view of the controversies which have raged round the

fascinating question of the location of the sovereignty in the American Constitution since Austin wrote, it is no small evidence of the acuteness of his powers of analysis that his remarks on this subject should be still quoted with approval by American authors.<sup>1</sup> Those remarks, however, need a more detailed illustration. In some respects they even require qualification. In the present note I discuss briefly the following topics: (1) The distinction between a Federal State and a Unitary State; (2) the distinction between a Federal State and a Confederation; (3) the location of the sovereignty in a Federal State.

(1) *The distinction between a Federal State and a Unitary State.*—The fundamental characteristic of the Federal State consists in a dualism of governmental organizations. A close parallel to such a dualism may be seen in the medieval scheme of society. According to medieval theory, the Holy Roman Empire was an organization of Christendom on its ecclesiastical and temporal sides. The medieval subject owed allegiance to two distinct and mutually independent authorities which were yet regarded as parts of one organized whole. Civil allegiance was due to the Emperor; spiritual allegiance, to the Pope. In a Federal State, on the other hand, both allegiances are political; one is to the National government, and the other is to one of a number of Provincial governments. These Provincial governments are distinguished from the local governments of a Unitary State in two respects—the Provincial government of a Federal State is very highly organized in its constitution, and is, in fact, capable of exercising all the necessary legislative, executive, and judicial functions of a National government; and as a consequence of the dualism to which reference has just been made, the relation which a Provincial government in a Federal State bears to the National is one of co-ordination, not of subordination. Of the two marks, the latter is the more distinctive. National and Provincial governments are mutually independent within their several spheres. In Unitary States with a fundamental constitution which cannot be altered by ordinary legislative process, the local government may chance to possess a certain degree of independence in its relation to the National government; but such independence will be found to be very inferior in degree to that which is characteristic of the Provincial government in a Federal State. The essence of a Federal State, as distinct from a Unitary State, is therefore a governmental dualism at a highly developed stage of government. A Federal State is one of which the governmental powers are divided between a National government and several Provincial governments, which, as regards internal structure, are for practical

purposes as highly organized as the National government, and as regards authority are co-ordinate with, not subordinate to, that government.

The foregoing definition may serve to decide whether, in any particular case, a State is Unitary or Federal. In practice, the realization and successful working of the dual disposition of governmental powers will be found to involve the following: (a) Some organization of the State distinct from, and superior to, the National and Provincial governments; (b) a written constitution in which the several spheres of the various governmental organizations are clearly defined; (c) some representation of the composite character of the union in the organization of the National government. Such a representation may take the form of rules relating to the constitution and functions of the National judicature. It may be effected by the equal representation of all the "States" in one of the legislative Chambers of the National government. It was effected in the Achæan League by the proviso according to which votes in the Central Assembly of the League were counted upon a civic basis as distinct from an individualistic. In the constitution of the Australian Commonwealth, the federal principle invades every department of the Commonwealth government, and even appears in the clauses which constitute the authority behind the central and local governments. An amendment of the constitution requires the support of an absolute majority of both, or of either, of the Houses of the Commonwealth Government, sanctioned by the direct popular approval of a majority of the electors in the Commonwealth, and also by *majorities of the electors in a majority of the States*.

The reference to the constitution of the Australian Commonwealth suggests the reflection that the Commonwealth is a Federation though it is not a Federal State. The dualism which is the most important mark of the Federal State is a dualism of governments, not in strictness a duality of the State. Hence some publicists have objected to the expression *Federal State*. But the term is convenient, and has been adopted by usage. Governmental dualism, it may be added, may exist not only in a subordinate political community, but even in a community composed of sovereign states. This is likely to happen where several states unite in a permanent alliance and appoint a common government for special purposes. While, however, usage admits the expression Federal government in the former case, it does not do so in the latter. A Federal government is either the government of a Federal state, or else the government of a subordinate political community modelled upon the government of a Federal State. Where the leading principle of Federal government is adopted externally to the organization of the State the term Confederation is employed.

Whether in a particular case a Constitution is Federal or Unitary is a question often difficult to answer. Governmental systems exist in every degree of complexity. One governmental type passes into another by insensible degrees. The difficulties are increased by the fact that legal theory and constitutional organizations are often very imperfect representations of the real facts of social and political life. The British Empire affords an interesting illustration. In legal theory, the Colonial governments are subordinate to, not co-ordinate with, the Imperial government; in practice, those governments exercise wider powers and enjoy a greater independence than the Provincial governments in most Federations. Although the British Empire is not a Federal State, the facts of social and political life appear to suggest that it is on the way to become so, if not already entitled to be called "a Federal State in the making."

(2) *The Federal State and the Confederation.*—The Federal State, as we have seen, is simply a single State with federal government. The Confederation is a group of States which are in more or less permanent alliance and possess a common central government for certain limited purposes. The dual government, which is *essential* to the Federal State, *may* exist in the Confederation if the several States have sovereign organizations from which the government of the Confederation, and the governments of the States, derive their authority. Obviously, cases may occur in which it is difficult to determine whether a union of political communities is a Confederation or a Federal State, i.e., whether the several communities have, or have not, retained their sovereignty. By the Act constituting the "Germanic Confederation" of 1820—

(a) A common central government or Diet was constituted composed of the plenipotentiaries of the several States and empowered

(1) To receive and accredit envoys and conclude treaties on behalf of the Confederation:

(2) To declare war against foreign States in case the territory of the Confederation should be threatened.

(b) The governments of the contracting States retained an independent jurisdiction over their own subjects.

(c) The States had no formally recognized right of withdrawal from the Confederation, and could not make war on one another.

The conclusion is suggested that the union formed a Federal State. That conclusion is refuted, however, by the following facts:—

(a) The maintenance of the independence and inviolability of the Confederated States was an avowed object of the union.

(b) Each of the States could receive and accredit envoys, make

treaties, and form any alliance of which the terms should not be prejudicial to the union.

- (c) If, in a case of alleged danger, the majority of the Diet refused to call out the united forces of the union, the minority was authorized to concert measures of self-defence.
- (d) The Diet could not constrain a recalcitrant State save by the power of other States who consented to place their military forces at his disposal.
- (e) No trace of over-sovereignty appears to have existed on the part of the Diet with regard to the citizens of the several States. The citizen owed allegiance to his State government alone.<sup>1</sup>

Under these circumstances, no doubt can exist that the union was a Confederation. The highly important question remains, however, as to which, if any, of the characteristics (a)-(e) are essential to this conclusion. Is there any single conclusive test for deciding such cases? Probably not, though one test of considerable value may be suggested: if, having regard to all the facts of the case, it is possible to regard the several members of the union as contracting parties who expressly or implicitly reserve to themselves the right of withdrawing from the union, the union is merely a Confederation. No such right was expressly reserved in the case of the Germanic Confederation, but its implication appears to be clear. A confederation, however, is apt to be a Federal State in the making. Both of the Confederations mentioned by Austin have long since become Federal States. Here as elsewhere, particular cases must be decided by relative degrees of likeness or unlikeness to type rather than by verbal definitions.

(3) *The location of the sovereignty in a Federal State.*—Although this subject is a highly controversial one, it deserves a careful consideration if we desire to understand the nature either of a Federal State or of sovereignty. I propose to deal solely with the case of the Constitution of the United States. In this Constitution there are: (a) A National government; (b) Provincial governments, which, as regards internal structure, are for practical purposes as highly organized as the National government, and as regards authority are co-ordinate with that government; (c) an organization of the States distinguishable from the National and Provincial governments and capable of readjusting their relations by amending the written constitution in which their several spheres are defined. This last-mentioned organization is provided by the fifth article of the Constitution, which reads as follows:—

<sup>1</sup> Hall, "International Law," p. 27.

"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article, and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

The significance of the provisos which conclude this section will be discussed in a later note on the limits of sovereign power. Apart from these provisos, the authorities to which reference is made in the section need to be distinguished according as they are initiative or sanctioning:—

(a) Authorities of Initiation. These are either—

- (1) Two-thirds of both Houses of Congress, or
- (2) Conventions summoned on the application of two-thirds of the States' legislatures.

(b) Authorities of Ratification. These are either—

- (1) The legislatures of three-fourths of the several States,  
or
- (2) Conventions in three-fourths of the several States.

Can the sovereignty be located under conditions so complex? In answer to this question I will venture to state two conclusions which are suggested by the letter of the section without reference to the history of its interpretation by American practice and American judges.

(1) We are not entitled to say that the sovereign is constituted of the National and Provincial governments together with the organization of the Republic behind them. On the one hand, an amendment of the Constitution proposed by Conventions summoned on the application of two-thirds of the States legislatures and ratified by the legislatures of three-fourths of the States, might limit the power of the Congress, though never assented to by that body. On the other hand, an amendment of the Constitution proposed by two-thirds of both Houses of the Congress and ratified by Conventions in three-fourths of the States, might limit the power of the State Legislatures, though never assented to by them. The National and Provincial governments are accordingly subordinate to the sovereign. The fact that in a given case they may chance to form part of it, only involves the consequence that they are capable of appearing in another than their normal capacity.



(2) The sovereignty, then, must be looked for in the organization of the Republic behind the National and Provincial governments. That organization is varying in constitution, and difficult to arouse to action. Though when once aroused its positively declared will may be omnipotent, the complications of procedure and the exacting requirements as to majorities have the practical result of almost ensuring its eternal slumber. In a word, although sovereignty exists within the State, and although there are means provided for the actualization of that sovereignty in authoritative organizations known to the law, those means can scarcely be deemed adequate to the needs of a great and rapidly developing Nationality.

## CHAPTER V

### THE LIMITS OF SOVEREIGN POWER

309. From the various shapes which sovereignty may assume or from the various possible forms of supreme government, I proceed to the limits, real and imaginary, of sovereign or supreme power.

310. Every positive law, or every law simply and strictly so called, is set, directly or circuitously, by a sovereign person or body, to a member or members of the independent political society wherein that person or body is sovereign or supreme. It follows that the power of a monarch properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of *legal* limitation. A monarch or sovereign number bound by a legal duty, were subject to a higher or superior sovereign: that is to say, a monarch or sovereign number bound by a legal duty, were sovereign and not sovereign. Supreme power limited by positive law, is a flat contradiction in terms.

The essential difference of a positive law, and the consequences thereof.

311. Nor would a political society escape from legal despotism, although the power of the sovereign were bounded by legal restraints. The power of the superior sovereign immediately imposing the restraints, or the power of some other sovereign superior to that superior, would still be absolutely free from the fetters of positive law. For unless the imagined restraints were ultimately imposed by a sovereign not in a state of subjection to a higher or superior sovereign, a series of sovereigns ascending to infinity would

govern the imagined community. Which is impossible and absurd.

Attempts  
of sover-  
eigns to  
oblige  
them-  
selves, or  
successors.

312. Monarchs and sovereign bodies have attempted to oblige themselves, or to oblige the successors to their sovereign powers. But in spite of such attempts the position that 'sovereign power is incapable of legal limitation' will hold universally or without exception. The immediate author of a law of the kind, or any of the sovereign successors to that immediate author, may abrogate the law at pleasure. And though the law be not abrogated, the sovereign for the time being is not constrained to observe it by a legal or political sanction. For if the sovereign for the time being were legally bound to observe it, that present sovereign would be in a state of subjection to a higher or superior sovereign. As it regards the successors to the sovereign or supreme powers, a law of the kind amounts, at the most, to a rule of positive morality. As it regards its immediate author, it is merely a law by a metaphor. For if we would speak with propriety, we cannot speak of a law set by a man to himself: though a man may adopt a principle as a guide to his own conduct, and may observe it as he would observe it if he were bound to observe it by a sanction.

313. For example: The sovereign Roman people solemnly voted or resolved, that they would never pass, or even take into consideration, what I will venture to denominate a *bill of pains and penalties*. This solemn resolution or vote was passed with the forms of legislation, and was inserted in the twelve tables in the following imperative terms: *privilegia ne irroganto*. By that resolution or vote, the sovereign people adopted, and commended to their successors in the sovereignty, an ethical principle or maxim. The present and future sovereign which the resolution affected to oblige, was not bound or estopped by it. Privileges enacted in spite

of it by the sovereign Roman people, were not illegal. The Roman tribunals might not have treated them as legally invalid acts, although they conflicted with the maxim, wearing the guise of a law, *privilegia ne irroganto*.

314. Again: By the authors of the union between England and Scotland, an attempt was made to oblige the legislature, which, in consequence of that union, is sovereign in both countries. It is declared in the Articles and Acts, that the preservation of the Church of England, and of the Kirk of Scotland, is a fundamental condition of the union: or, in other words, that the Parliament of Great Britain shall not abolish those churches, or make an essential change in their structures or constitutions. Now, so long as the bulk of either nation shall regard its established church with love and respect, the abolition of the church by the British Parliament would be an immoral act; for it would violate positive morality which obtains with the bulk of the nation. Assuming that the church establishment is commended by the revealed law, the abolition would be irreligious: or, assuming that the continuance of the establishment were commended by general utility, the abolition, as generally pernicious, would also amount to a sin. But no man, talking with a meaning, would call a parliamentary abolition of either or both of the churches an illegal act. For if the parliament for the time being be sovereign in England and Scotland, it cannot be bound legally by that condition of the union which affects to confer immortality upon those ecclesiastical institutions. That condition of the union is not a positive law, but is counsel or advice offered by the authors of the union to future supreme legislatures.\*

314. Q. (1) That a legal sovereign cannot be subject to legal limitation follows from the very definition of the term. But may there not be a state without a legal sovereign? Examine especially the case of a Federal State with a written constitution containing no provision for its amendment.

*Note.—The limits of sovereign power.*—I propose to examine

The  
epithet  
*unconsti-  
tutional*.

§15. By the two examples which I have now adduced, I am led to consider the meanings of the epithet *unconstitutional*, as it is distinguished from the epithet *illegal*, and as it is applied to conduct of a monarch, or a sovereign number

in the present place the more important of the limitations which are alleged to exist upon the supreme organized power in states, and to consider to what extent these limitations invalidate the Austinian doctrine. They may be classified for purposes of convenience under one or other of the following heads:

- (1) Limitations in *fact*, arising from—
  - (a) The character of the rulers.
  - (b) The resistance of the governed.
  - (c) International relations.
  - (d) Physical impossibilities.
- (2) Limitations in *law*, arising from—
  - (a) Conflict with the prevailing doctrine of the sphere of State action.
  - (b) Conflict with ordinary positive law.
  - (c) Conflict with a superior law—Divine, Natural, Customary, or Constitutional.

(1) *Limitations in fact*.—The existence of these is fully admitted by Austin. A few illustrations will suffice. (a) The rulers are human, and therefore subject to the weaknesses, the ambitions, the desires, the limitations of other men. A great statesman is reported to have said that the average intelligence of the members of his Cabinet was probably not higher than the intelligence of the humbler tradesman. But, whether rulers be wise or not, their aims and policy are largely the product of their day and generation. They cannot do what they desire, and even what they desire is largely predetermined. "People," observes Professor Dicey, "sometimes ask the idle question why the Pope does not introduce this or that reform. The true answer is that a Revolutionist is not the kind of man who becomes a Pope."<sup>1</sup> (b) Rulers are certain to provoke the resistance of the governed if they do not keep within certain limits. However wise and however noble they may be, they cannot force their views on a reluctant people. (c) Apart from the humanity alike of the rulers and of the subjects, the will of the rulers is limited by the fact that a State is not alone in the world. Other States exist, and have aspirations which are not always friendly. A State possessed of a consuming desire for moral and intellectual elevation may find itself exterminated by a neighbouring state which has set its heart upon the humbler

<sup>1</sup> "Law of the Constitution," 5th ed., p. 77.

in its collegiate and sovereign capacity. The epithet unconstitutional, as thus opposed and applied, is sometimes used with a meaning which is more general and vague, and is sometimes used with a meaning which is more special and definite. I will begin with the former.

object of military efficiency. (d) Finally, many things which from some points of view might be very desirable, may be physically impossible. Montesquieu admitted that even the British Parliament could not make a man a woman. The great American Republic cannot change the hue of the negro.

(2) *Limitations in law.*—We are here in more debatable territory. Three cases deserve consideration, according as the alleged limitations arise from (a) conflict with the prevailing doctrine as to the State's sphere of action, (b) conflict with positive law, (c) conflict with a law alleged to be superior to positive law.

(a) *Limitations arising from conflict with the prevailing doctrine of the State's sphere of action.*—The power of the Legislature, contended Locke, is to preserve and not to destroy; it cannot possibly be absolutely arbitrary over the lives and fortunes of the people.<sup>1</sup> What a people could not (rightly) ordain over itself, ought not to be ordained by the Legislator over the People, declared Kant.<sup>2</sup> In the medieval State, the sphere of State action was limited by much narrower considerations. The Church in particular occupied a privileged position; the clergy enjoyed many immunities, the inviolability of which was accepted at times as completely as the order of nature. Under such conditions the Austinian doctrine was not tenable. The modern state, however, has taken a broader view of its function, and has affected to concern itself with the moral and intellectual elevation of the people. It has abolished the privileges of the clergy, and extended the authority of law over all subjects. Modern theory, differentiating between Politics and Law, relegates to the former the analysis and discussion of such doctrines as those suggested by Locke and Kant, and attributes to the supreme State organization a legally absolute power of defining its own sphere of action. What that organization ordains will not be questioned by the law courts on the ground of incompatibility with the State's purpose. Such questioning as may arise will be referred to other limitations which have yet to be considered.

(b) *Limitations alleged to exist as a result of positive law.*—Thiering, in his work on the Evolution of Law, affirms the existence

<sup>1</sup> Cf. "Second Treatise on Government," :

<sup>2</sup> "Principles of Politics," p. 58.

316. (1) In every independent political society, there are principles or maxims which the sovereign habitually observes, and which the bulk of the society, or the bulk of its

of three distinct phases of legal development. In the first phase, law is no more than unilaterally binding particular command; in the second phase, it is unilaterally binding general command; in the third phase, it is bilaterally binding general command. In the second phase, the lawgiver may intend to respect the law, but he does not wish to assure it against the fluctuations of his own caprice. In the third phase, the lawgiver holds himself bound by the law so long as it exists. "Only in the third phase can the people feel that invincible confidence which is essential to the building up of character. . . . If Religion may be defined as faith in God, Law may be defined as faith in the State."<sup>1</sup> The argument appears to me to be unanswerable. As I shall endeavour to show later on, the fact that a sovereign makes a law does not prevent him from being bound by it so long as it exists, if he elects to be bound by it, invariably respects it, and permits its enforcement even as against himself. In the modern state such conditions are taken for granted. Nevertheless, positive law must not be regarded as a limitation upon the sovereign in the sense of the term limitation which is at present under discussion. The sovereign can *change* a law at will, and is only bound by it, so long as he does not choose to amend or repeal it.

(c) *Limitations alleged to exist as a result of conflict with superior law.*—These involve a more serious qualification of the Austinian doctrine. They allege that the highest organization known to law may be bound *absolutely* by virtue of some law declared to be superior to its will—Law Divine, Natural, Customary, or Constitutional. Divine and Natural Law are more important as limitations in medieval than in modern times. Speaking of the State and Law in the Middle Ages, Dr. Gierke writes: "Men taught that the highest power on earth was subject to the rules of Natural Law. They stood above the Pope and above the Kaiser, above the Ruler and above the Sovereign People, nay, above the whole Community of Mortals. Neither statute nor act of government, neither resolution of the People, nor custom, could break the bonds that thus were set."<sup>2</sup> A like doctrine has been affirmed by the courts in times comparatively modern.<sup>3</sup> The fact that it is no longer maintained is due partly to the

<sup>1</sup> "L'Evolution du droit," §§ 152-69.

<sup>2</sup> "Political Theories of the Middle Age," p. 75.

<sup>3</sup> Cf. *Bonhams Case*, 8 Rep. 118. *Day and Savadge*, Hob. 85-7 and *supra* §§ 191-7

influential members, regard with feelings of approbation. Not unfrequently, such maxims are expressly adopted by the sovereign or state. More commonly, they are not ex-

growth of doctrines of absolute sovereignty, and partly to an increased confidence in the rulers arising from the publicity of modern life and the growth of political liberty. Customary Law, also, as a legal limitation upon the supreme power, may be regarded as belonging to a past order of things. Constitutional Law, on the other hand, cannot be dismissed so briefly. Two cases in particular have given rise to practical difficulties in applying the doctrine of legislative omnipotence—the attempts of sovereigns to bind their successors, and the rules of fundamental Constitutional Law.

The attempts of sovereigns to bind their successors have been generally held invalid. Legal interpretation in this case appears to have a sound basis in both utility and logic. Let us suppose that the British Parliament passes a Statute which purports to be unrepealable. At least three distinct interpretations are possible. The Courts might hold (a) that the Statute was binding until directly or indirectly repealed; (b) that the Statute was binding until expressly repealed; (c) that the Statute was wholly unrepealable. The course of legal interpretation in England suggests the probability of the first-mentioned solution. The Act of Union with Scotland provided that the Presbyterian Church should remain for ever established in Scotland. Within four years after the Union, an Act was passed which involved a violation of this provision. The validity of the later Act has been upheld by the House of Lords. But even if the Courts declared that a Statute purporting to be unrepealable was binding until expressly repealed, the declaration would involve no absolute limitation upon Parliament, since Parliament could at any moment effect such a repeal. It is just conceivable, however, that a Statute of the kind supposed might be held to be absolutely unrepealable. If such an interpretation were made, and acquiesced in, then it would have to be admitted that Parliament was no longer sovereign. The interpretation would be contrary to utility. In my opinion, it would also be logically unsound, for the reason that an authority conferred upon a Statute by Parliament cannot be greater than Parliament, and ought to be held withdrawable by Parliament.

Rules of fundamental constitutional law stand on a different footing. They appear at times to impose an absolute limitation upon the supreme organization. Bodin, though a strong advocate of absolutist doctrines of sovereignty, admitted the existence of *leges imperii* like the Salic Law, which no sovereign could trans-



pressly adopted, but are simply imposed by opinions prevalent in the community. In either case the sovereign or state is bound to observe them by merely moral sanctions. Or (changing the phrase) in case it ventured to deviate from

gress.<sup>1</sup> In more modern times, the division between laws which the ordinary Legislature could amend and the laws which it could not, has given rise to difficulties in applying the doctrine of sovereignty. Such difficulties are now generally overcome by regarding sovereignty as vested in the power which can amend the Constitution. But what if there be no such power? Where a limitation is imposed by a supreme organization it ought to be held removable by that organization. Where, however, it is imposed by some power superior to that organization, as by a Revolutionary Assembly, the logical result appears to be that the limitation can only be removed by appeal to that Assembly. In all probability, however, an attempt would be made to evade such a consequence. Italian jurists, when called upon to interpret the Italian Constitution which made no provision for its amendment, held that the power of amending must be *assumed* to have been implicitly conferred on the legislative body. It would have been more logical, perhaps, to have attributed it to the monarch. "Where the origin of the Constitution is due to a grant from the ruler, it would seem that the same competence that enables him to make such a grant would enable him to alter its provisions at will."<sup>2</sup>

An interesting illustration of the difficulties of the kind under consideration is offered by the American Constitution. The fifth section of that Constitution, after defining the organization behind Federal and states' governments, proceeds to impose a limitation upon this organization by requiring that no state shall be deprived, save by its own consent, of its privilege to equal representation in the Federal Senate. An amendment of the Constitution introducing the principle of representation in the Federal Senate on a basis of population, if not accepted by all the states, would be invalid, though approved by the powers which for every other purpose answer the description of a legal sovereign. But what would happen if the powers last referred to, approved of an amendment of the fifth section which omitted the proviso as to the conditions under which the states might be deprived of an equal representation in the Senate? It appears to me that the Courts would be compelled to hold such an amendment invalid

<sup>1</sup> "De Republica," I. VIII.

<sup>2</sup> Willoughby, "Nature of the State," p. 215.

a maxim of the kind in question, it would not and could not incur a legal pain or penalty, but it probably would incur censure, and might chance to meet with resistance.

until it had received the assent of all the states. The fifth section as it stands is evidently framed with the object of prescribing a sovereign organization which shall vary in constitution, not merely according to the will of certain parties, but also according to the nature of the proposed change. In other words, the famous proviso implies, not a limitation upon the sovereign power, but a special organization of the sovereign power for a special purpose. But whether this logical interpretation would be adopted to-day is apparently doubtful. Professor Burgess, in his chapter on the Sovereignty in the Constitution of the United States, writes: "From the standpoint of political science I regard this legal power of the legislature of a single commonwealth to resist successfully the will of the sovereign as unnatural and erroneous. It furnishes the temptation for the powers back of the Constitution to reappear in revolutionary organization and solve the question by power, which bids defiance to a solution according to law. There is a growing feeling among our jurists and publicists that, in the interpretation of the Constitution we are not to be strictly held by the intentions of the framers, especially since the whole fabric of our State has been so changed by the results of rebellion and civil war. They are beginning to feel, and rightly so, that present conditions, relations, and requirements should be the chief consideration, and that when the language of the Constitution will bear it, these should determine the interpretations. From this point of view all the great reasons of political science and of jurisprudence would justify the adoption of a new law of amendment by the general course of amendment now existing, without the attachment of the exception; and in dealing with the great questions of public law, we must not, as Mirabeau finely expressed it, lose the *grande morale* in the *petite morale*."<sup>1</sup>

*Summary.*—If the foregoing observations be sound, it must be admitted that, apart from the *de facto* limitations whose existence Austin admits, other limitations upon a power claiming to be supreme have been recognized from time to time by legal theory. Limitations alleged to exist as a result of conflict with ordinary positive law may be placed on one side, since such law may be changed by the lawmaker, and may therefore be said to bind him, but not to limit his legislative power. Limitations alleged to exist as a result of conflict with a doctrine of the sphere of State action, or with Divine, Natural, or Customary law, belong

<sup>1</sup> 'Political Science and Constitutional Law,' I, 152, 153.

317. Now, if a law or other act of a monarch or sovereign number conflict with a maxim of the kind to which I have adverted above, the law or other act may be called unconstitutional (in that more general meaning which is sometimes given to the epithet). For example: The *ex post facto* statutes which are styled acts of attainder, may be called unconstitutional, though they cannot be called illegal. For they conflict with a principle of legislation which parliament has habitually observed, and which is regarded with approbation by the bulk of the British community.

318. In short, when we style an act of a sovereign an unconstitutional act (with that more general import which is sometimes given to the epithet), we mean, I believe, this: That the act is inconsistent with some given principle or maxim: that the given supreme government has expressly adopted the principle, or, at least, has habitually observed it: that the bulk of the given society, or the bulk of its influential members, regard the principle with approbation: and that, since the supreme government has habitually observed the principle, and since the bulk of the society

to medieval rather than modern legal thought. Limitations alleged to exist as a result of conflict with the declared will of a sovereign predecessor seem to me also irrelevant, since the authority conferred by a power on a law cannot be greater than the power itself, and can therefore be withdrawn by that power. Where, however, the limitations are alleged to exist as a result of conflict with fundamental constitutional law, a case of which a Federal Constitution without an authority for amending the Constitution would be a good example, the defender of the Austinian doctrine is driven into a corner from which he cannot easily escape. In such a case he may urge that the power of amending the Constitution must be *assumed* to have devolved on the Federal legislative body. But this is to beg the question at issue; the assumption is a legal fiction which can only be justified on the plea of practical needs. In a word, the Austinian position that a supreme legislature is incapable of legal limitation, is a position which does not rest, as Austin supposes, upon logical necessities, but upon the humbler ground of expediency.

regard it with approbation, the act in question must thwart the expectations of the latter, and must shock their opinions and sentiments. Unless we mean this, we merely mean that we deem the act in question generally pernicious: or that, without a definite reason for the disapprobation which we feel, we regard the act with dislike.

319. (2) The epithet unconstitutional as applied to conduct of a sovereign, and as used with the meaning which is more special and definite, imports that the conduct in question conflicts with constitutional *law*. And by the expression *constitutional law*, I mean the positive morality, or the compound of positive morality and positive law, which fixes the constitution or structure of the given supreme government. I mean the positive morality, or the compound of positive morality and positive law, which determines the character of the person, or the respective characters of the persons, in whom, for the time being, the sovereignty shall reside: and, supposing the government in question an aristocracy or government of a number, which determines moreover the mode wherein the sovereign powers shall be shared by the constituent members of the sovereign number or body.

320. Now, against a monarch properly so called, or against a sovereign body in its collegiate and sovereign capacity, constitutional law is positive morality merely, or is enforced merely by moral sanctions: though, as I shall show hereafter, it may amount to positive law, or may be enforced by legal sanctions, against the members of the body considered severally. The sovereign for the time being, or the predecessors of the sovereign, may have expressly adopted, and expressly promised to observe it. But whether constitutional law has thus been expressly adopted, or simply consists of principles current in the political community, it is merely guarded, against the sovereign, by sentiments or feelings

of the governed. Consequently, although an act of the sovereign which violates constitutional law, may be styled with propriety unconstitutional, it is not an infringement of law simply and strictly so called, and cannot be styled with propriety illegal.

321. For example: From the ministry of Cardinal Richelieu down to the great revolution, the king for the time being was virtually sovereign in France. But, in the same country, and during the same period, a traditional maxim cherished by the courts of justice, and rooted in the affections of the bulk of the people, determined the succession to the throne: It determined that the throne, on the demise of an actual occupant, should invariably be taken by the person who then might happen to be heir to it agreeably to the canon of inheritance which was named the Salic Law. Now, in case an actual king, by a royal ordinance or law, had attempted to divert the throne to his only daughter and child, that royal ordinance or law might have been styled with perfect propriety an unconstitutional act. But illegal it could not have been called: for, inasmuch as the actual king was virtually sovereign, he was inevitably independent of legal obligation. Nay, if the governed had resisted the unconstitutional ordinance, their resistance would have been illegal or a breach of positive law, though consonant to the positive morality which is styled constitutional law, and perhaps to that principle of utility which is the test of positive rules.

322. Again: An act of the British parliament vesting the sovereignty in the king, or vesting the sovereignty in the king and the upper or lower house, would essentially alter the structure of our present supreme government, and might therefore be styled with propriety an unconstitutional law. In case the imagined statute were also generally pernicious, and in case it offended moreover the generality or bulk of

'the nation, it might be styled irreligious and immoral as well as unconstitutional. But to call it illegal were absurd: for if the parliament for the time being be sovereign in the united kingdom, it is the author, directly or circuitously, of all our positive law, and exclusively sets the measure of legal justice and injustice.'

322. Q. (1) Draw a list of acts illustrating the use of the expression "unconstitutional" in both of the senses indicated by Austin.

(2) Would the following be unconstitutional in either of the senses indicated by Austin:

(a) An Act of Parliament passed with the object of making the King liable to criminal process?

(b) An Act of Parliament introducing Protection,  
(1) Before consulting the constituencies; (2) After?

(3) Austin speaks of Constitutional Law as a compound of positive law and positive morality. What is the test for determining to which of these two classes a rule of Constitutional law belongs? Apply your answer to the rule regulating the succession to the throne in an absolute monarchy.

*Note.*—Austin discusses the epithet unconstitutional, as it is opposed to illegal, and as it is applied to the conduct of the sovereign—meaning by the term, I take it, legal sovereign. The fact has been overlooked by some of his critics, who accuse Austin of refusing to admit that any rule of Constitutional Law can be a rule of positive law. Such a statement is sufficiently refuted by sections 324–30, which affirm the legal liabilities of the several members of a sovereign body. In sections 315–22 Austin is discussing, not the question whether Constitutional Law is law or not, but the question whether *any* rule of Constitutional Law can impose legal limits upon the sovereign.

Austin's description of Constitutional Law as a compound of positive law and positive morality recalls the distinction, which Professor Dicey has developed with so much skill, between Constitutional Law proper and the Convention of the Constitution—the former being a body of rules recognized by the Courts, as, for example, the rule that the King can do no wrong: the latter being a body of maxims or practices which, though they regulate the ordinary conduct of the crown, of ministers, and of other persons under the Constitution, are not in strictness laws at all, e.g. the rule that the King must assent to any Bill which has been passed by both Houses of Parliament.

Austin's statement that an Act of the Imperial Parliament

The meaning of Hobbes's proposition that 'no law can be unjust.'

323. It is affirmed by Hobbes, in his masterly treatises on government, that 'no law can be unjust:' which proposition has been deemed by many, an immoral or pernicious paradox. If we look at the scope of the treatises in which it occurs, or even at the passages by which it is immediately followed, we shall find that the proposition is neither pernicious nor paradoxical, but is merely a truism put in unguarded terms. His meaning is obviously this: that 'no *positive* law is *legally* unjust.' And the decried proposition, as thus understood, is indisputably true. For positive law is the measure or test of legal justice and injustice: and, consequently, if positive law might be legally unjust, positive law might be unjust as measured or tried by itself. For just or unjust, justice or injustice, is a term of relative and varying import. By the epithet just, we mean that a given object, to which we apply the epithet, accords with a given law to which we refer it as to a test. And as that which is just conforms to a determinate law, justice is the conformity of a given object to the

vesting the sovereign power in the King or either of the Houses would be perfectly valid has been challenged by Professor Clark, who remarks: "I apprehend the conduct of the Parliament would be called, and reasonably called by all people, illegal."<sup>1</sup> The time for defending such a view is now past. The British Parliament is a legal sovereign; and one of the great advantages of having a legal sovereign is to make a revolution under the forms of law possible. While supporting Austin on this point, I am not prepared to subscribe to the position that, as against the Parliament, Constitutional Law is positive morality. The fact that Parliament can change law at will does not entitle it to regard that law as positive morality against itself. So long as the law exists, Parliament is capable of being bound by it. The contrary view belongs, in my opinion, to a very undeveloped or transitional order of legal ideas. Constitutional Law is no legal limit upon the British Parliament, not because the Parliament cannot be bound by it, but because the Parliament can repeal or amend it.<sup>2</sup>

<sup>1</sup> "Practical Jurisprudence," p. 171.

<sup>2</sup> Cf. notes to § 314 and § 357.

same or a similar measure: for justice is the abstract term which corresponds to the epithet just. By the epithet unjust, we mean that the given object conforms not to the given law. And since the term injustice is merely the corresponding abstract, it signifies the nonconformity of the given and compared object to that determinate law which is assumed as the standard of comparison.—And since such is the relative nature of justice and injustice, one and the same act may be just and unjust as tried by different measures. Without doubt, the term *justice* or *injustice* sometimes denotes emphatically, conformity or non-conformity to the ultimate measure or test: namely, the law of God. This is the meaning annexed to *justice*, when law and justice are opposed: when a positive human rule is styled unjust.\*

324. When I affirm that the power of a sovereign is incapable of legal limitation, I always mean by a 'sovereign,' a monarch properly so called, or a sovereign number in its collegiate and sovereign capacity. Considered collectively, or considered in its corporate character, a sovereign number is sovereign and independent: but, considered severally, the individuals and smaller aggregates composing that sovereign number are subject to the supreme body of which they are component parts. Consequently, though the body is inevitably independent of legal or political duty, any of the individuals or aggregates whereof the body is composed

The legal liability of members of a sovereign body.

323. Q. (1) Illustrate the Austinian point of view by discussing the justice of the following:

- (a) A decision of the House of Lords which overrules an earlier decision of an inferior tribunal.
- (b) A decision of the House of Lords which establishes a new rule of law.
- (c) An Act of Parliament which involves an admitted departure from the spirit of our constitution.

(2) Is it permissible to describe every act not forbidden by law as just?



may be legally bound by laws of which the body is the author. For example: A member of the house of lords or a member of the house of commons may be legally bound by an act of parliament, which, as one of the sovereign legislature, he has concurred with others in making. Nay, he may be legally bound by statutes, or by rules made judicially, which have immediately proceeded from subject or subordinate legislatures: for a law which proceeds immediately from a subject or subordinate legislature is set by the authority of the supreme.

325. And hence an important difference between monarchies or governments of one, and aristocracies or governments of a number.

326. Considered severally, the members of a sovereign body, even as members of the body, may be legally bound by laws of which the body is the author, and which regard the constitution of the given supreme government.—In case it be clothed with a legal sanction, or the means of enforcing it judicially be provided by its author, a law set by the body to any of its own members is properly a positive law: It is properly a positive law, or a law strictly so called, although it be imposed upon the obliged party as a member of the body which sets it.—In case the law be invested with a legal or political sanction, and regard the constitution or structure of the given supreme government, a breach of the law, by the party to whom it is set, is not only *unconstitutional*, but is also *illegal*. The breach of the law is unconstitutional, inasmuch as the violated law regards the constitution of the state. The breach of the law is also illegal, inasmuch as the violated law may be enforced by judicial procedure.

327. For example: The king, as a limb of the parliament, might be punishable by act of parliament, in the event of his transgressing the limits which the constitution has set

to his authority: in the event, for instance, of his pretending to give to a proclamation of his own the legal effect of a statute emanating from the sovereign legislature. Or the members of either house might be punishable by act of parliament, if, as forming a limb of the parliament, they exceeded their constitutional powers: if, for instance, they pretended to give that legal effect to an ordinance or resolution of their body.

328. Where, then, the supreme government is a monarchy or government of one, constitutional law, as against that government, is inevitably nothing more than positive morality. Where the supreme government is an aristocracy or government of a number, constitutional law, as against the members of that government, may either consist of positive morality, or of a compound of positive morality and positive law. Against the sovereign body in its corporate and sovereign character, it is inevitably nothing more than positive morality. But against the members considered severally, be they individuals or be they aggregates of individuals, it may be guarded by legal or political, as well as by moral sanctions.

329. In fact or practice, the members considered severally, but considered as members of the body, are commonly free, wholly or partially, from legal or political restraints. For example: The king, as a limb of the parliament, is not responsible legally, or cannot commit a legal injury: and, as partaking in conduct of the assembly to which he immediately belongs, a member of the house of lords, or a member of the house of commons, is not amenable to positive law. But though this freedom from legal restraints may be highly useful or expedient, it is not necessary or inevitable. Considered severally, the members of a sovereign body, be they individuals or be they aggregates of individuals, may clearly be legally amenable, even as members of the body, to laws which the body imposes.

330. And here I may remark, that if a member considered severally, but considered as a member of the body, be wholly or partially free from legal or political obligation, that legally irresponsible aggregate, or that legally irresponsible individual, is restrained or debarred in two ways from an unconstitutional exercise of its legally unlimited power.

1. Like the sovereign body of which it is a member, it is obliged or restrained morally: that is to say, it is controlled by opinions and sentiments current in the given community.
2. If it affected to issue a command which it is not empowered to issue by its constitutional share in the sovereignty, its unconstitutional command would not be legally binding, and disobedience to that command would therefore not be illegal. Nay, although it would not be responsible legally for thus exceeding its powers, those whom it commissioned to execute its unconstitutional command, would probably be amenable to positive law, if they tried to accomplish their mandate. For example: If the king or either of the houses, by way of proclamation or ordinance, affected to establish a law equivalent to an act of parliament, the pretended statute would not be legally binding. And although the king or the house would not be responsible legally for this supposed violation of constitutional law or morality, those whom the king or the house might order to enforce the statute, would be liable civilly or criminally, if they attempted to execute the order.

'The  
limited  
monarch.'

331. I have affirmed above, that, taken or considered severally, all the individuals and aggregates composing a sovereign number are subject to the supreme body of which they are component parts. By the matter contained in the last paragraph, I am led to clear the proposition to which I have now adverted, from a seeming difficulty.

332. Generally speaking, if a member of a sovereign body, taken or considered severally, be not amenable to positive

law, it is merely as a member of the body that he is free from legal obligation. Generally speaking, he is bound, in his other characters, by legal restraints. But in some of the mixed aristocracies which are styled limited monarchies, the so-called limited monarch is exempted or absolved completely from legal or political duty. For example: According to a maxim of the English law, the king is incapable of committing wrong: that is to say, he is not responsible legally for aught that he may please to do, or for any forbearance or omission.

333. But though he is absolved completely from legal or political duty, it cannot be thence inferred that the king is sovereign or supreme, or that he is not in a state of subjection to the sovereign or supreme parliament of which he is a constituent member. Of the numerous proofs of this negative conclusion, which it were easy to produce, the following will amply suffice.—1. Although he is free in fact from the fetters of positive law, he is not incapable of legal obligation. A law of the sovereign parliament, made with his own assent, might render himself and his successors legally responsible. But a monarch properly so called, or a sovereign number in its corporate and sovereign character, cannot be rendered, by any contrivance, amenable to positive law.—2. If he affected to transgress the limits which the constitution has set to his authority, disobedience on the part of the governed to his unconstitutional commands would not be illegal: whilst the ministers or instruments of his unconstitutional commands, would be legally amenable, for their unconstitutional obedience, to laws of that sovereign body whereof he is merely a limb. But commands issued by sovereigns cannot be disobeyed by their subjects without an infringement of positive law: whilst the ministers or instruments of such a sovereign command, cannot be legally responsible to any portion of the community, except-

ing the author of their mandate.—3. He habitually obeys the laws set by the sovereign body of which he is a constituent member. If he did not, he must speedily yield his office to a less refractory successor, or the British constitution must speedily expire. If he habitually broke the laws set by the sovereign body, the other members of the body would probably devise a remedy: though a prospective and definite remedy, fitted to meet the contingency, has not been provided by positive law, or even by constitutional morality. Consequently, he is bound by a cogent sanction to respect the laws of the body, although that cogent sanction is not predetermined and certain. A law which is set by the opinion of the upper and lower houses (besides a law which is set by the opinion of the community at large) constrains him to observe habitually the proper and positive laws which are set by the entire parliament.—But habitually obeying the laws of a determinate and sovereign body, he is not properly sovereign: for such habitual obedience consists not with that independence which is one of the essentials of sovereignty.\*

333. Q. Define the expression "limited monarchy."

*Note.*—In the note to Section 289 a brief reference was made to the view that sovereignty in the British Constitution might be regarded as divisible into Legislative and Executive. In opposition to that view, I held that the King in Council is legally subordinate to the King in Parliament. In actual practice, the Executive fulfils its function subject to the general direction of Parliament. From the point of view of legal theory, an Act of Parliament remodelling the Executive or restricting its powers would be completely valid. The position is criticized by Professor Salmond, who remarks that the Crown "is not merely a part of the Legislature, but also a part without whose consent the Legislature cannot exercise any fragment of its own power. . . . A power over a person which cannot be exercised without that person's consent is no power over him at all."<sup>1</sup> With all deference to this acute writor, it seems to me that questions

334. But if sovereign or supreme power be incapable of legal limitation, or if every supreme government be legally absolute, wherein (it may be asked) doth political liberty consist, and how do the supreme governments which are commonly deemed free, differ from the supreme governments which are commonly deemed despotic?

335. I answer, that political or civil liberty is the liberty from legal obligation, which is left or granted by a sovereign government to any of its own subjects: and that, since the power of the government is incapable of legal limitation, the government is legally free to abridge their political liberty, at its own pleasure or discretion.

336. Political or civil liberty has been erected into an idol, and extolled with extravagant praises by doting and fanatical worshippers. But political or civil liberty is not more worthy of eulogy than political or legal restraint. Political or civil liberty, like political or legal restraint, may be generally useful, or generally pernicious; and it is not as

of fact and law are here confused. If a radical change in the constitution of the Executive is approved by both Houses, whether the King assents to it or rejects it, he does so, not in his executive capacity as executing laws, but in his legislative capacity as making them. Legal theory requires us to differentiate between the King or the Crown in these two capacities. Professor Salmond appears to me to illustrate the difficulties which arise in the absence of such a differentiation when he adds that the British Constitution has a sovereign Judicature as well as a sovereign Legislature and sovereign Executive. If our sovereignty were really of this threefold character insoluble difficulties must arise as to whether in a particular case one of the sovereign powers had or had not exceeded its sphere. In point of fact, differences might arise between our different governmental organs, but happily the Constitution provides an organization capable of dealing with all such differences. That organization is the King in Parliament, the final depository of all governmental power, the living expression of the unity of the State. To assert an executive sovereignty or a judicial sovereignty involves a denial of the ideal unity of the King and Parliament—a unity as much a matter of law as the unity of the State is a matter of fact.

being liberty, but as conducing to the general good, that political or civil liberty is an object deserving applause. The final cause or purpose for which government ought to exist, is the furtherance of the common weal to the greatest possible extent. In so far as it attains its appropriate purpose by conferring rights upon its subjects, government attains that purpose through the medium of political liberty. But since it must impose a duty wherever it confers a right, and should also impose duties which have no corresponding rights, it is less through the medium of political liberty, than through that of legal restraint, that government must attain the purpose for which it ought to exist. To say that political liberty ought to be its principal end, or to say that its principal end ought to be legal restraint, is to talk absurdly: for each is merely a mean to that furtherance of the common weal, which is the only ultimate object of good or beneficent sovereignty. But though both propositions are absurd, the latter of the two absurdities is the least remote from the truth.

337. Political or civil liberties rarely exist apart from corresponding legal restraints. Where persons in a state of subjection are free from legal duties, their liberties (generally speaking) would be nearly useless to themselves, unless they were protected in the enjoyment of their liberties, by legal duties on their fellows: that is to say, unless they had legal rights (importing such duties on their fellows) to those political liberties which are left them by the sovereign government. I am legally free, for example, to move from place to place, in so far as I can move from place to place consistently with my legal obligations: but this my political liberty would be but a sorry liberty unless my fellow-subjects were restrained by a political duty from assaulting and imprisoning my body. Through the ignorance or negligence of a sovereign government, some of the civil

liberties which it leaves or grants to its subjects, may not be protected against their fellows by answering legal duties: and some of those civil liberties may perhaps be protected sufficiently by religious and moral obligations. But, speaking generally, a political or civil liberty is coupled with a legal right to it: and, consequently, political liberty is fostered by that very political restraint from which the devotees of the idol liberty are so fearfully and blindly averse.\*

337. *Note.*—The remarks of Austin as to the nature of political or civil liberty suggest three topics for consideration: the unity which underlies the different uses of the term "liberty"; the distinction between civil and political liberty; and the relation between liberty and right.

(1) *The unity which underlies the different uses of the term "liberty."*—This unity is found in the idea of freedom from some constraint which is external to the individual either in fact or in conception. The constraint may take one or other of several forms:—

- (a) The interference of one's fellow-citizens;
- (b) The interference on the part of the ruling powers of the State;
- (c) That interference with the development of one's true self, which happens when some momentary pleasure is preferred to a permanent good.

Restraint of the kind last mentioned may seem to need illustration. "Love Virtue," said Milton, "she alone is free." So a dipsomaniac is said to be the slave of a depraved taste; a Don Juan the victim of the tyranny of passion. The apparent paradox involved in the differentiation of the two selves recalls the remark of Aristotle that Nature implies complete development, and that the nature of a thing may be defined to be its condition when its growth is complete.<sup>1</sup> The real self is thus conceived of as something different from the self actually existing at any particular moment, something which is becoming rather than in being, something which can only be realized on the condition of rising above the flashes of momentary impulse, something which must have been present to the mind of Shakespeare when he wrote: "To thine own self be true." So Professor Bosanquet defines liberty as the *condition of being ourselves*. "There is something worthy of



Govern-  
ment free  
and  
despotic,

338. From the nature of political or civil liberty, I turn to the supposed difference between free and despotic governments.

Dante in Rousseau's observation that the convicts in the galleys at Genoa had 'Liberty' stamped on their chains. The fetters of the bad self are the symbols of freedom."<sup>1</sup> The region into which we are here transferred may seem remote; but the nature of political and civil liberty will only be grasped by the student who has the courage to look occasionally beyond the immediate borders of his own special subject, and to examine that ideal of moral freedom which it is the purpose of civil and political liberty to promote. The truth of this statement will be apparent when we come to consider the conception of political liberty as consisting in self-government.

(2) *The relation of civil to political liberty.*—The freedom from an external constraint which is fundamental in the conception of liberty can only be assured in a society of human beings where each recognizes in others the claims which he makes for himself. The individual can only be free to do as he ought, on condition of recognizing that he is not free to do as he likes. Liberty implies Law. We thus arrive at a conception of it as consisting in a certain power of self-determination residing alike in others and ourselves—a power not to do exactly as we wish but necessarily limited by reference to a like power in others—a power regulated by law. The expression "civil and political liberty" indicates the power of self-determination which is secured to individuals by the existing government and positive laws. The civil and political liberty which I enjoy is the power of self-determination which is assured to me by the State and the laws, and is protected from the arbitrary interference on the part of either my fellow-citizens or the officers of government.

The expressions "civil liberty" and "political liberty," however, are not interchangeable. They are distinguished by reference to a positive element, the means employed for the assurance of the power of self-determination. Where we are thinking of that power, as secured to us by the laws, we employ the term "civil liberty." Where we are thinking of it as secured to us by such institutions as the franchise and representative government, we employ the term "political liberty." In popular usage the positive element is more prominent in the conception of political liberty than in that of civil liberty, although it is implicit in both.

In the development of the detail involved in the conceptions of civil and political liberty, continental usage is different from

<sup>1</sup> "Philosophical Theory of the State," p. 142 n.

339. Every supreme government is *free* from legal restraints; or (what is the same proposition dressed in a different phrase) every supreme government is legally *despotic*. The distinction, therefore, of governments into

English. Thus M. Boutmy, after having defined civil liberty as the protection of person and property assured to the individual against the government, remarks that this protection must be guaranteed by political liberties such as the right of association and assembly, the freedom of the Press, and a national representation founded on a widely extended electoral franchise. The author then remarks that the right of association and assembly, and the freedom of the Press, are not regarded in England as political liberties, but as civil liberties. "They have never been raised to the dangerous dignity of constitutional prerogatives, but have been left in the position of purely private rights. They have always been regarded as corollaries contained in the fundamental postulate of personal liberty, from which they have become separated. The right of assembly proceeds directly from the right every man has to come, go, or stay where he likes. The right of association is simply a development of the right to enter into contracts. The liberty of the Press is a particular example of the liberty to think and speak."<sup>1</sup>

Hitherto I have considered the terms civil liberty and political liberty as referring to *actualities*. The terms are sometimes used to designate *idealities*—the liberty which *ought* to exist as distinguished from that which *does* exist. The ideal of political liberty is self-government—an ideal which can only be realized in a society where the restraints upon individuals which liberty implies are self-imposed, not in the mere sense that they are popularly approved, but in the sense that they are formally made by the society through the direct vote of individual citizens, or through representatives whom those citizens have chosen and control. Used in a still deeper sense, political liberty as an ideal implies even more—the imposition of restraints in the interests of a common good—government of selves by selves in the interest of all. The individual is morally free where the true self triumphs over the baser elements. The State is politically free when the restraints upon the action of its citizens are self-imposed in the interests of the well-being of all. In this connection the ideal of political liberty has a deeper meaning than is generally appreciated. It looks forward to a society wherein the wisdom and the virtue of the whole community triumph over the sinister interests of a class

<sup>1</sup> "The English People," p. 207.

free and despotic, can hardly mean that some of them are freer from restraints than others: or that the subjects of the governments which are denominated free, are protected against their governments by positive law.

or of individuals—a condition to the realization of which a democratic constitution, which is often made synonymous with political liberty, is but one of many means.

(3) *Austin's use of the terms "liberty" and "right."* The various dicta of Austin on this subject seem to indicate a lack of clearness and precision not usual with him. His general position, however, as it is indicated by a statement in a later lecture, appears to be substantially accurate. "In liberty, the prominent or leading idea is the absence of restraint; whilst the security for the enjoyment of that liberty is the secondary idea. Right, on the other hand, denotes the protection and connotes the absence of restraint."<sup>1</sup> The distinction may be illustrated by the following cases. One citizen has the liberty, or the right, to make a present to another citizen. If the paramount idea be that of the obligation upon other citizens not to interfere with him in the exercise of this privilege, we may use the term "right." But if, as is more likely, the paramount idea be that the privilege to make gifts is part of that sphere of activity within which a man is free from external interference or control, we should use the term "liberty." Strictly speaking, we ought not to say that a man has a right to rise at six a.m. What we really mean is that he is at liberty to rise at that hour. We are not thinking of duties on the part of other citizens to refrain from interfering with him in his decision, but of the privilege which he enjoys to decide such questions for himself without any direction from the laws. So we say that a man is at liberty to make a fool of himself rather than he has a legal right to do so. If X, observing his friend Y in that predicament at amateur theatricals, succeeds in diverting the attention of the audience in order to save Y's reputation, Y is not legally protected from that interference, so long as X does not violate any specific rule of law, as by removing Y bodily from the stage. In a society where the religious code consisted simply of prohibitions against polytheism and smoking,<sup>2</sup> a man may enjoy religious liberty to run away with his neighbour's wife, but not a religious right to do so, since the religious code imposes no obligation on the husband to abstain from interfering with him in the exercise of this religious liberty. Such cases as these illustrate

<sup>1</sup> "Jurisprudence," I, 356.

<sup>2</sup> Cf. Palgrave, "Journey through Central and Eastern Arabia," II, 11.

340. Nor can it mean that the governments which are denominated free, leave or grant to their subjects more of political liberty than those which are styled despotic. For the epithet *free* importing praise, and the epithet *despotic* importing blame, they who distinguish governments into free and despotic, suppose that the first are better than the second. But inasmuch as political liberty may be generally useful or pernicious, we cannot infer that a government is better than another government, because the sum of the liberties which the former leaves to its subjects, exceeds the sum of the liberties which are left to its subjects by the latter. The excess in the sum of the liberties which the former leaves to its subjects, may be purely mischievous. It may consist of freedom from restraints which are required by the common weal; and which the government would lay upon its subjects, if it fulfilled its duties to the Deity. In consequence, for example, of that mischievous freedom, its subjects may be guarded inadequately against one another, or against attacks from external enemies.

341. They who distinguish governments into free and despotic, probably mean this: In every political society, the government, in conferring rights and imposing duties, more or less disregards the common or general weal, and looks to

the fact that liberty and right are not inseparable. In developed systems, however, the tendency is in the *direction* of making them so. "The plaintiff," said Lord Lindley in *Quinn v. Leatham*, "had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing."<sup>1</sup>

<sup>1</sup> 1901. A.C., 534.

the peculiar interests of a portion or portions of the community.—Now the governments which deviate less from that ethical principle or maxim, are better than the governments which deviate more. But, according to the opinion of those who make the distinction in question, the governments which deviate less from that ethical principle or maxim, are *popular* governments, meaning by a *popular* government any aristocracy which consists of such a number of the given political community as bears a large proportion to the number of the whole society. For it is supposed by those who make the distinction in question, that, where the government is popular, the interests of the sovereign number, and the interests of the entire community, are nearly identical, or nearly coincide: but that, where the government is monarchical, or where the supreme powers reside in a comparatively few, the sovereign one or number has numerous interests which are not consistent with the good of the general.—According, therefore, to those who make the distinction in question the duties which a government of many lays upon its subjects, are more consonant to the general good than the duties which are laid upon its subjects by a government of one or a few. Consequently, though it leaves or grants not to its subjects, more of political liberty than is left or granted to its subjects by a government of one or a few, it leaves or grants to its subjects more of the political liberty *which conduces to the common weal*. But, as leaving or granting to its subjects more of that useful liberty, a government of many may be styled free: whilst, as leaving or granting to its subjects less of that useful liberty, a government of one or a few may be styled not free, or may be styled despotic or absolute. Consequently, a free government is a popular government: whilst a despotic government is either a monarchy or an oligarchy.

342. They who distinguish governments into free and

despotic, are therefore lovers of democracy. By the epithet free, as applied to governments of many, they mean that governments of many are comparatively good: and by the epithet despotic, as applied to monarchies or oligarchies, they mean that monarchies or oligarchies are comparatively bad. The epithets free and despotic are rarely, I think, employed by the lovers of monarchy or oligarchy. If the lovers of monarchy or oligarchy did employ those epithets, they would apply the epithet free to governments of one or a few, and the epithet despotic to governments of many. For they think the former comparatively good, and the latter comparatively bad; or that monarchical or oligarchical governments are better adapted than popular, to attain the ultimate purpose for which governments ought to exist. They deny that the latter are less misled than the former, by interests which are not consistent with the common or general weal: or, granting that excellence to governments of many, they think it greatly outweighed by numerous other excellences which they ascribe to governments of one or to governments of a few. But with the respective merits or demerits of various forms of government, I have no direct concern. I have examined the current distinction between free and despotic governments, because it is expressed in terms which are extremely inappropriate and absurd, and which tend to obscure the independence of political or legal obligation, that is common to sovereign governments of all forms or kinds.\*

342. Seeley makes an interesting contribution to the distinction under discussion. All government, he argues, rests on force. But force implies the support of at least a considerable number of the community. Hence in every community, whether despotic or free, we have to distinguish between the government and the body which supports the government. Now the body which supports the government may be said to make it, and certainly has the power to destroy it. In States where that body is organized,

Why it has been doubted, that sovereign incapable of legal limitation. 343. That the power of a sovereign is incapable of legal limitation has been doubted, and even denied. But the difficulty, like thousands of others, probably arose from a verbal ambiguity.—The foremost individual member of a so-called limited monarchy, is styled improperly *monarch* or *sovereign*. Now the power of a monarch or sovereign, thus improperly so styled, is not only capable of legal limitations, but is sometimes actually limited by positive law. But monarchs or sovereigns, thus improperly so styled, were confounded with monarchs, and other sovereigns, in the proper acceptation of the terms. And since the power of the former is capable of legal limitations, it was thought that the power of the latter might be bounded by similar restraints.

The proposition asserted by renowned political writers.

344. Whatever may be its origin, the error is remarkable. For the legal independence of monarchs in the proper acceptation of the term, and of sovereign bodies in their corporate and sovereign capacities, not only follows inevitably from the nature of sovereign power, but is also asserted expressly by renowned political writers of opposite parties or sects: by celebrated advocates of the governments which are decked with the epithet free, as by celebrated advocates of the governments which are branded with the epithet despotic.

345. 'If it be objected (says Sidney) that I am a defender of arbitrary powers, I confess I cannot comprehend how any society can be established or subsist without them.

the government is free. In other States, the government is despotic. The distinction between a free and a despotic State is thus a distinction between States which have, and States which have not, an organization by means of which public opinion makes, supports, and destroys the government. Great Britain enjoys free government; Russia is a despotism.<sup>1</sup>

<sup>1</sup> Cf. Seeley, "Political Science," Lectures v.-viii.

The difference between good and ill governments is not, that those of one sort have an arbitrary power which the others have not; for they all have it; but that in those which are well constituted, this power is so placed as it may be beneficial to the people.'

346. 'It appeareth plainly (says Hobbes) to my understanding, that the sovereign power whether placed in one man, as in monarchy, or in one assembly of men, as in popular and aristocraticall commonwealths, is as great as men can be imagined to make it. And though of so unlimited a power men may fancy many evill consequences, yet the consequence of the want of it, which is warre of every man against his neighbour, is much worse. The condition of man in this life shall never be without inconveniences: but there happeneth in no commonwealth any great inconvenience, but what proceeds from the subjects' disobedience. And whosoever, thinking sovereign power too great, will seek to make it lesse, must subject himselfe to a power which can limit it: that is to say, to a greater.'—'One of the opinions (says the same writer) which are repugnant to the nature of a commonwealth, is this: that he who hath the sovereign power is subject to the civill lawes. It is true that all sovereigns are subject to the lawes of nature; because such lawes be Divine, and cannot by any man, or by any commonwealth, be abrogated. But to the civill lawes, or to the lawes which the sovereign maketh, the sovereign is not subject: for if he were subject to the civill lawes, he were subject to himselfe; which were not subjection, but freedom. The opinion now in question, because it setteth the civill lawes above the sovereign, setteth also a judge above him, and a power to punish him: which is to make a new sovereign; and, again, for the same reason, a third to punish the second; and so continually without end, to the confusion and dissolution of the commonwealth.'—'The difference



(says the same writer) between the kinds or forms of commonwealth, consisteth not in a difference between their powers, but in a difference between their aptitudes to produce the peace and security of the people: which is their end.'

A sovereign not a subject of rights.

347. Before I discuss the origin of political government and society, I will briefly examine a topic allied to the liberty of sovereigns from political or legal restraints.

348. A sovereign government of one, or a sovereign government of a number in its collegiate and sovereign capacity, has no *legal rights* (in the proper acceptation of the term) *against its own subjects*.

349. Every legal right is the creature of a positive law: and it answers to a relative duty imposed by that positive law, and incumbent on a person or persons other than the person or persons in whom the right resides. To every legal right, there are three several parties: namely, a party bearing the right; a party burthened with the relative duty; and a sovereign government setting the law through which the right and the duty are respectively conferred and imposed. A sovereign government cannot acquire rights through laws set by itself to its own subjects. A man is no more able to confer a right on himself, than he is able to impose on himself a law or duty. Every party bearing a right (divine, legal, or moral) has necessarily acquired the right through the might or power of another: that is to say, through a law and a duty (proper or improper) laid by that other party on a further and distinct party. If a government had legal rights against its own subjects, it could not be sovereign, for those rights were the creatures of positive laws set to its own subjects by a third person or body.

'Right is might.'

350. It has often been affirmed that 'right is might,' or that 'might is right.' But this paradoxical proposition is either a truism affectedly and darkly expressed, or is false

and absurd. If it mean that a party who possesses a right possesses the right through might or power of his own, the proposition is false and absurd. For a party who possesses a right necessarily possesses the right through the might or power of another: namely, the author of the law by which the right is conferred. If it mean that right and might are one and the same thing, the proposition in question is also false and absurd. My physical ability to move about, when my body is free from bonds, may be called *might* or *power*, but cannot be called a *right*: though my ability to move about *without hindrance from you*, may doubtless be styled a right, with perfect precision, if I owe the ability to a law imposed upon you by another. If, again, it mean that every right is a creature of might or power, the proposition is merely a truism, disguised in paradoxical language. For every right (divine, legal, or moral) rests on a relative duty; that is to say, a duty lying on a party or parties other than the party or parties in whom the right resides. And, manifestly, that relative duty would not be a duty substantially, if the law which affects to impose it were not sustained by might.

351. So far as subjects are bound by the law of God to obey their temporal sovereign, a sovereign government has *rights divine* against those subjects: rights which are conferred upon itself, through duties which are laid upon its subjects, by laws of a common superior. And so far as the members of its own community are severally constrained to obey it by the opinion of the community at large, it has also *moral rights* (or rights arising from positive morality) against its own subjects severally considered: rights which are conferred upon itself by the opinion of the community at large, and which answer to relative duties laid upon its several subjects by the general or prevalent opinion of the same indeterminate body.

352. Consequently, when we say that a sovereign govern-

ment, as against its own subjects, has or has not a right to do this or that, we necessarily mean by a right (supposing we speak exactly), a right Divine or moral: we necessarily mean (supposing we speak exactly) that it has or has not a right derived from a law of God, or derived from a law improperly so called which the general opinion of the community sets to its members severally.

353. But when we say that a government, as against its own subjects, has or has not a right to do this or that, we not uncommonly mean that we deem the act in question generally useful or pernicious. This application of the term right, resembles an application of the term justice to which I have adverted above.—An act which conforms to the Divine law, is styled, emphatically, just; an act which does not, is styled, emphatically, unjust. An act which is generally useful, conforms to the Divine law as known through the principle of utility: an act which is generally pernicious, does not conform to the Divine law as known to the same exponent. Consequently, ‘an act which is just or unjust,’ and ‘an act which is generally useful or generally pernicious,’ are nearly equivalent expressions.—An act which a sovereign government has a Divine right to do, it, emphatically, has a right to do: if it has not a Divine right, it, emphatically, has not a right. An act which were generally useful, the Divine law, as known through the principle of utility, has conferred on a sovereign government a right to do: an act which were generally pernicious, the Divine law, as known through the same exponent, has not conferred on the sovereign government a right to do. Consequently, an act which the government has a right to do, is an act which were generally useful: as an act which the government has not a right to do, is an act which were generally pernicious.

354. To ignorance or neglect of the palpable truths which I have expounded in the present section, we may impute a

pernicious jargon that was current in our own country on the eve of her horrible war with her North American children. By the great and small rabble in and out of Parliament, it was said that the government sovereign in Britain was also sovereign in the colonies; and that, since it was sovereign in the colonies, it had a *right* to tax their inhabitants. It was objected by Mr. Burke to the project of taxing the inhabitants, that the project was *inexpedient*: pregnant with probable evil to the inhabitants of the colonies, and pregnant with probable evil to the inhabitants of the mother country. But to that most rational objection, the sticklers for the scheme of taxation returned this asinine answer. They said that the British government had a right to tax the colonists; and that it ought not to be withheld by paltry considerations of expediency, from enforcing its sovereign right against its refractory subjects.—Now, assuming that the government sovereign in Britain was properly sovereign in the colonies, it had no legal right to tax its colonial subjects; although it was not restrained by positive law, from dealing with its colonial subjects at its own pleasure or discretion. If, then, the sticklers for the scheme of taxation had any determinate meaning, they meant that the British government was empowered by the law of God to tax its American subjects. But it had not a Divine right to tax its American subjects, unless the project of taxing them accorded with general utility: for every Divine right springs from the Divine law; and to the Divine law, general utility is the index. Consequently, when the sticklers for the scheme of taxation opposed the right to expediency, they opposed the right to the only test by which it was possible to determine the reality of the right itself.

355. A sovereign government of one, or a sovereign govern-  
 ment of a number in its collegiate and sovereign capacity, Appear-  
ance of a  
sovereign  
govern-  
 may appear in the character of defendant, or may appear in

ment  
before its  
own  
tribunals.

the character of demandant, before a tribunal of its own appointment, or deriving jurisdiction from itself. But from such an appearance of a sovereign government, we cannot infer that the government lies under legal duties, or has legal rights against its own subjects.

356. Supposing that the claim of the plaintiff against the sovereign defendant were truly founded on a positive law, it were founded on a positive law set to the sovereign defendant by a third person or body: or (changing the phrase) the sovereign defendant would be in a state of subjection to another and superior sovereign. Which is impossible and absurd.—And supposing that the claim of the sovereign demandant were truly founded on a positive law, it were founded on a positive law set by a third party to a member, or members of the society wherein the demandant is supreme: or (changing the phrase) the society subject to the sovereign demandant, were subject, at the same time, to another supreme government. Which is also impossible and absurd.

357. The rights which are pursued against a sovereign government before tribunals of its own, and also the rights which it pursues before tribunals of its own, are merely *analogous* to legal rights (in the proper acceptation of the term): or (borrowing the brief and commodious expressions by which the Roman jurists commonly denote an analogy) they are legal rights *quasi*, or legal rights *uti*.—The rights which are pursued against it before tribunals of its own, it may extinguish by its own authority. But, this notwithstanding, it permits the demandants to prosecute their claims: And it yields to those claims, when they are established judicially, *as if* they were truly founded on positive laws set to itself by a third and distinct party.—The rights which it pursues before tribunals of its own, are powers which it is free to exercise according to its own pleasure. But, this notwithstanding, it prosecutes its claims

through the medium of judicial procedure, as *if* they were truly founded on positive laws set to the parties defendant by a third person or body.

358. The foregoing explanation of the seeming legal rights which are pursued against sovereign governments before tribunals of their own, tallies with the style of judicial procedure, which, in all or most nations, is observed in cases of the kind. The object of the plaintiff's claim is not demanded as of right, but is begged of the sovereign defendant as a grace or favour.

359. In our own country, claims pursued judicially against our own king are presented to the courts of justice in the same or a similar style. The plaintiff *petitions* the royal defendant to grant him his so-called right; or he shows to the royal defendant his so-called right and injury, and prays the royal defendant to yield him fitting redress. —But where a claim is pursued judicially against our own king, this mendicant style of presenting the claim is merely accidental. It arises from the mere accident that our own king, though not properly sovereign, is completely free in fact from legal or political duties. Since he is free in fact from every legal obligation, no one has a legal right (in the proper acceptation of the term) against the king: for if any had a legal right against the king, the king were necessarily subject to an answering legal duty. But seeing that our own king is merely a limb of the parliament, and is virtually in a state of subjection, he is capable of legal duties; and he is capable of legal rights. In point of fact, the king has legal rights against others of his fellow subjects: though by reason of his actual exemption from every legal obligation, none of his fellow subjects have legal rights against him.

360. Though a sovereign government of one, or a sovereign Legal government of a number in its collegiate and sovereign rights of

sovereign capacity, cannot have legal rights against its own subjects, it  
 against may have a legal right against a subject or subjects of  
 foreign another sovereign government. For seeing that a legal or  
 subjects, political right is not of necessity saddled with a legal or  
 political trust, the positive law conferring the right may not  
 be set to the government on which the right is conferred.  
 The law conferring the right (as well as the relative duty  
 answering to the right) may be laid or imposed exclusively  
 on the subject or subjects of the government by which the  
 right is imparted. The possession of a legal or political  
 right against a subject or subjects of another sovereign  
 government, consists, therefore, with that independence  
 which is one of the essentials of sovereignty.\*

360. Q. (1) If a sovereign may have legal rights against a subject of another sovereign, may it not also be under a legal duty towards the subject of another sovereign? But if so, can it be said to be a sovereign in the Austinian sense?

(2) Discuss the tenability of Austin's general conclusion with respect to the possibility of a sovereign having legal rights against its own subjects.

*Note.*—The position adopted by Austin may be summarized as follows: A man cannot command himself, for command implies sanction, and there is no true sanction where the penalty which is to be inflicted upon a person or body is inflicted at the discretion of that person or body. Moreover, as a man cannot impose a duty upon himself, neither can he confer a right. If two persons are necessary to the conception of a duty, three are necessary to the conception of a right. We ought not to regard as a right, a privilege which an authority is entitled to exercise solely by virtue of a law of its own making; such a privilege may be exercised according to forms which resemble those by which legal rights are enforced; but it cannot be placed on the same footing. It is not a legal right, but a quasi-legal right.

Austin's argument, though severely criticized by many authors, is not altogether without excuse. If we consider the occasions which may be quoted as illustrating the existence of legal rights and duties between sovereign and subject, we shall often find that it is not for naught that the sovereign has been judge in his own cause. Austin refers to the differences of procedure; but apart from these differences, sovereigns and their delegates have not been slow to take advantage of their position. The maxim

*Nullum tempus occurrit reipublice* is an illustration. So it has been held that the Crown, impersonation of the sovereign or the State, is not liable for the torts of its servants. Professor Harrison Moore, in an article on the legal liabilities of the Executive, remarks upon a disposition on the part of the Courts to prefer the claims of the public service to those of the individual.<sup>1</sup>

To excuse Austin is not to justify him. I maintain that the sovereign may have *rights* against the subject, and even may be subject to *duties* towards the subject.

(1) *The sovereign may have rights against the subject.*—One difficulty in the way of realizing this fact arises from a confusion of different kinds of alleged rights. It may be said, for example, that a sovereign has: (a) a right that subjects who contract with him shall do what they undertake to do; (b) a right to receive payment of the taxes which the laws impose on the subject; (c) a right to tax the subject. Many of the arguments used against the possibility of admitting legal rights against subjects are inspired solely by reference to the third of these cases. As regards the first two cases, the application of the term "right" in a legal sense is neither meaningless nor inaccurate. It accords with common sense, with popular usage, with the practice of the Courts, and even with Austin's own definition. "A party has a legal right when another or others are forced or obliged by the law to do or forbear towards or in regard of him."<sup>2</sup> If a theory of sovereignty is in conflict with this conclusion, so much the worse for that theory. The alleged right of a sovereign to tax his subjects stands on a different footing. Everything that a sovereign chooses to do in a formal manner it *may* do, so far as the law is concerned. If the British Parliament imposes a tax, and a subject refuses to pay the tax, the legal right violated is not that of the sovereign to impose the tax, but that of the sovereign to receive payment of the tax. If we say the British Parliament has a right to pass a law or impose a tax, we can only mean *moral* right. But in a community where the government is distinct from the sovereign, a question might easily arise whether a government *had* a legal right to impose a tax. It may be noted in this connection that the Parliamentarians opposed to Burke may have meant more than Austin supposes. When they declared the existence of a right to tax the colonists, they probably meant that a colonist does not cease to be a subject. The statement thus interpreted is not intrinsically absurd when we remember that it was made in an age when colonies were apt to be regarded as excrescences rather than parts incorporated in a larger whole.

<sup>1</sup> "Journal of Comparative Legislation," XII., 282-6.

<sup>2</sup> "Jurisprudence," Lecture XVI.



(2) *The subject may have a right against the sovereign.*—The difficulty of admitting the fact originates in a confusion similar to that which was mentioned under the preceding proposition. Subjects can have no right against the State, argues Green.<sup>1</sup> But by this he means that they can have no moral right to disobey the laws save in the interests of the State. The position, morally, may be unassailable; nor, in communities with a sovereign law-making organ, can we suppose for a moment that a subject has a legal right of resisting the declared will of that organ even in the interests of the State. To argue to the contrary is to expose oneself to the full force of the argument, urged alike by Austin and by Kant, that the supposition of such a right implies the existence of a power capable of enforcing it, capable, i.e., of coercing the sovereign and so superior to the sovereign. I believe that most of the arguments against admitting the existence of legal rights against a sovereign have simply this case in view, and so fail to meet the case where the alleged right is with the sovereign's full permission and actual sanction. As I have previously urged, sovereignty does not preclude the notion of obligation, but only the notion of limitation by a power external to itself. If a sovereign, having laid down a law that contracts shall be enforced, enters into contracts with its own subjects, and if those contracts are enforced as a matter of fact by its Courts even as against the sovereign, then it is impossible to deny that the sovereign is under a legal duty towards its subjects. We cannot refuse to describe the sovereign's liability as a legal duty on the ground that the sanction is self-imposed, if as a matter of fact the sanction is invariably admitted by the sovereign and applied by the Courts. Austin's failure to recognize the fact is a conclusive illustration of the need for revising his theory of sovereignty.

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"Principles of Political Obligation," § 141.

## CHAPTER VI

### ORIGIN OR CAUSES OF POLITICAL SOCIETY

361 I now have defined or determined the general notion of sovereignty, including the general notion of independent political society: And, in order that I might further elucidate the nature or essence of sovereignty, and of the independent political society which sovereignty implies, I have considered the possible forms of supreme political government with the limits, real or imaginary, of supreme political power. To complete my intended disquisition, I proceed to the origin or causes of the habitual or permanent obedience, which, in every society political and independent, is rendered by the bulk of the community to the monarch or sovereign number. In other words, I proceed to the origin or causes of political government and society.

362. The proper purpose or end of a sovereign political government, or the purpose or end for which it ought to exist, is the greatest possible advancement of human happiness: Though, if it would advance the good of mankind, it commonly must labour particularly to advance the weal of its own community. The good of the universal society formed by mankind, is the aggregate good of the particular societies into which mankind is divided: just as the happiness of any of those societies is the aggregate happiness of its single or individual members. Though, then, the weal of mankind is the proper object of a government, or though the test of its conduct is the principle of general utility, it commonly ought to consult directly and particularly the

weal of the particular community which the Deity has committed to its rule. If it truly adjust its conduct to the principle of general utility, it commonly will aim immediately at the particular and more precise, rather than the general and less determinate end.

363. It were easy to show, that the general and particular ends never or rarely conflict. Universally, or nearly universally, the ends are inseparably connected. An enlightened regard for the common happiness of nations, implies an enlightened patriotism; whilst the patriotism which looks exclusively to country, and would further the interests of country at the cost of all other communities, grossly misapprehends and frequently crosses the interests that are the objects of its narrow concern.

Not the  
protec-  
tion of  
property.

364. And here it may be observed that, by many of the speculators on political government and society, one or a few of the instrumental ends through which a government must accomplish its proper absolute end, are mistaken for that paramount purpose. For example: It is said by many of the speculators on political government and society, that 'the purpose of every government is to institute and protect property.' But if the creation and protection of property were its proper paramount purpose, its proper paramount purpose might be the advancement of misery, rather than the advancement of happiness; since many of the rights which governments have created and protected (as the rights of masters, for example, to and against slaves) are generally pernicious, rather than generally useful.

Nor in-  
crease  
of wealth.

365. The prevalent mistake which I have stated is committed by certain of the writers on the science of political economy, whenever they meddle incidentally with the connected science of legislation. Whenever they step from their own into the adjoining province, they make expressly, or they make tacitly and unconsciously, the following

assumption: that the proper absolute end of a sovereign political government is to further as far as is possible the growth of the national wealth. If they think that a political institution fosters production and accumulation, or that a political institution damps production and accumulation, they pronounce, without more ado, that the institution is good or bad. They forget that the wealth of the community is not the weal of the community, though wealth is one of the means requisite to the attainment of happiness. They forget that a political institution may further the weal of the community, though it checks the growth of its wealth; and that a political institution which quickens the growth of its wealth, may hinder the advancement of its weal.\*

366. From the proper purpose or end for which a sovereign political government ought to exist, we may readily infer the causes of that habitual obedience which would be paid to the sovereign by the bulk of an enlightened society. Supposing that a given society were adequately instructed or enlightened, the habitual obedience to its government which was rendered by the bulk of the community, would exclusively arise from reasons based on the principle of utility. If they thought that the government accomplished perfectly its proper purpose or end, this their conviction or opinion would be their motive to obey. If they deemed the government faulty, a fear that the evil of resistance might surpass the evil of obedience, would be their inducement to submit; for they would not persist in their obedience to a government which they deemed imperfect, if they thought that a better government might probably be got by resistance, and that the probable good of the change outweighed its probable mischief.

367. Since every actual society is inadequately instructed or enlightened, the habitual obedience to its government

365. Q. Does Austin base government on force or on utility?

which is rendered by the bulk of the community, is partly the consequence of custom : They partly pay that obedience to that present or established government, because they, and perhaps their ancestors, have been in a habit of obeying it. Or the habitual obedience is partly the consequence of prejudices : meaning by 'prejudices,' opinions and sentiments which have no foundation whatever in the principle of general utility. If, for example, the government is monarchical, they partly pay that obedience to that present or established government, because they are fond of monarchy inasmuch as it is monarchy, or because they are fond of the race from which the monarch has descended. Or if, for example, the government is popular, they partly pay that obedience to that present or established government, because they are fond of democracy inasmuch as it is democracy, or because the word 'republic' captivates their fancies and affections.

368. But though that habitual obedience is partly the consequence of custom, or though that habitual obedience is partly the consequence of prejudices, it partly arises from a reason based upon the principle of utility. It partly arises from a perception of the expediency of political government from a preference of government to anarchy. And this is the only cause of the habitual obedience in question, which is common to all societies, or nearly all societies. It therefore is the only cause of the habitual obedience in question, which the present general disquisition can properly embrace. The causes of the obedience in question which are peculiar to particular societies, belong to the province of statistics, or the province of particular history.

369. The only general cause of the *permanence* of political governments, and the only general cause of the *origin* of political governments, are exactly or nearly alike. Though every government has arisen in part from specific or particular

causes, almost every government must have arisen in part from the following general cause: namely, that the bulk of the natural society from which the political was formed, were desirous of escaping to a state of government, from a state of nature or anarchy. If they liked specially the government to which they submitted, their general perception of the utility of government concurred with their special inclination. If they disliked the government to which they submitted, their general perception of the utility of government controlled and mastered their repugnance.

370. According to a current expression, the permanence and origin of every government are owing to the people's *consent*: that is to say, every government continues through the *consent* of the people, or the bulk of the political community: and every government arises through the *consent* of the people, or the bulk of the natural society from which the political is formed. According to the same opinion dressed in a different phrase, the power of the sovereign flows from the people, or the people is the fountain of sovereign power.

The position 'that every government continues through the people's consent.'

371. Now the permanence of every government depends on the habitual obedience which it receives from the bulk of the community. For if the bulk of the community were fully determined to destroy it, the might of the government would scarcely suffice to reduce them to subjection. But all obedience is *voluntary* or *free*, or every party who obeys consents to obey. In other words, every party who obeys wills the obedience which he renders, or is determined to render it by some motive or another. If a man condemned to imprisonment were dragged to the prison by the jailors, he would not obey or submit. But if he were liable to imprisonment in the event of his refusing to walk to it, and if he were determined to walk to it by a fear of that further restraint, the man would render obedience to the sentence or command

of the judge.—Since, then, a government continues through the obedience of the people, and since the obedience of the people is voluntary or free, every government continues through the consent of the people, or the bulk of the political society. If they like the government, they are determined to obey it habitually, or to consent to its continuance, by their attachment. If they hate the government, they are determined to obey it habitually, or to consent to its continuance, by their dread of a violent revolution. They consent to what they abhor, because they avoid thereby what they abhor more.—As correctly or truly apprehended, the position ‘that every government continues through the people’s consent,’ merely amounts to this: That, in every society political and independent, the people are determined by motives of some description or another, to obey their *government habitually*: and that, if the bulk of the community ceased to obey it habitually, the government would cease to exist.

372. But the position in question, as it is often understood, is taken with one or another of the two following meanings.

373. Taken with the first of those meanings, the position amounts to this: That the bulk of every community approve of the established government, or prefer it to every government which could be substituted for it: and that they consent to its continuance, or pay it habitual obedience, by reason of that their approbation or by reason of that their preference. As thus understood, the position is ridiculously false: the habitual obedience of the people in most or many communities, arising wholly or partly from their fear of the probable evils which they might suffer by resistance.

374. Taken with the second of those meanings, the position amounts to this: That, if the bulk of a community dislike the established government, the government ought not to

continue. And, if every actual society were adequately enlightened, the position as thus understood would approach nearly to the truth. For the dislike of an enlightened people towards their established government, would beget a violent presumption that the government was faulty or imperfect. But, in every actual society, the government has neglected to instruct the people in sound political science; or pains have been taken by the government, or the classes that influence the government, to exclude the bulk of the community from sound political science, and to perpetuate or prolong the prejudices which weaken and distort their undertakings. Every society, therefore, is inadequately instructed or enlightened: And, in most or many societies the love or hate of the people towards their established government would scarcely beget a presumption that the government was good or bad. An ignorant people may love their established government, though, by cherishing pernicious institutions and fostering mischievous prejudices, it positively prevents the progress in useful knowledge and in happiness, which its subjects would make spontaneously if it simply were careless of their good. And as an ignorant people may love their established government, though it positively crosses the purpose for which it ought to exist, so may an ignorant people hate their established government, though it labours strenuously and wisely to further the general weal. The dislike of the French people to the ministry of the godlike Turgot, amply evinces the melancholy truth. They stupidly thwarted the measures of their warmest and wisest friend, and made common cause with his and their enemies: with the rabble of nobles and priests who strove to uphold misrule, and to crush the reforming ministry with a load of calumny and ridicule.\*

374. Q. (1) Is it necessary, in defining law, to take into consideration the motives which compel obedience to law? Consider



The position 'that every govern- 375. That the *permanence* of every government is owing to the people's consent, and that the *origin* of every government is owing to the people's consent, are two positions so

whether, having in view the emphasis that Austin lays upon the popular appreciation of the utility of political society, he is consistent in defining law as a command. (Cf. § 13 as to definition of command.)

(2) Why does Austin, in Sections 367-8, omit to refer to fear as a motive to obedience?

*Note.—The motives of obedience.*—The question of the motives of obedience is one of extreme difficulty. Motives vary with the age, with the individual, and with the nature of particular laws. A man who will obey most laws from exalted motives may obey others from the basest. Moreover, the motive of which a man is most conscious is by no means necessarily the most potent in determining his conduct. Even if he can judge the motives which determine his own conduct, he may well feel diffident in affirming the motives which determine the conduct of other people. The student who wishes to pursue the subject should read the chapter on "Obedience" in Mr. Bryce's "Studies in History and Jurisprudence."<sup>1</sup> The learned author declares Political Obedience to be a form of compliance in general, the grounds or motives of which he sums up under five heads:—

- (1) Indolence, i.e. the disposition of a man to let some one else do for him what it would give him trouble to do for himself.
- (2) Deference, i.e. some emotion drawing one person to another, disposing him to obey the will of that other.
- (3) Sympathy, i.e. "not merely the emotion evoked by the sight of a corresponding emotion in another, but the various forms of what may be called the associative tendency in mankind."
- (4) Fear, "a motive acting powerfully upon the ruder and more brutish natures."
- (5) Reason, "as guiding the more thoughtful and gentle natures."

The author concludes: "In the sum total of obedience, the percentage due to Fear and to Reason respectively is much less than that due to Indolence, and less also than that due to Deference or to Sympathy."

In comparing the classifications of Mr. Bryce and Austin, it will be obvious that indolence and deference are connected with habit,

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<sup>1</sup> II, 1-43.

closely allied, that what I have said of the former will nearly apply to the latter.

376. Every government has arisen through the consent of the people, or the bulk of the natural society from which the political was formed. For the bulk of the natural society from which a political is formed, submit freely or voluntarily to the inchoate political government. Or (changing the phrase) their submission is a consequence of motives, or they will the submission which they render.

377. But a special approbation of the government to which they freely submit, or a preference of that government to every other government, may not be their motive to submission. Although they submit to it freely, the government perhaps is forced upon them: that is to say, they could not withhold their submission from that particular government, unless they struggled through evils which they are loath to endure. Determined by a fear of the evils which would follow a refusal to submit (and, probably, by a general perception of the utility of political government), they freely submit to a government from which they are specially averse.

378. The expression 'that every government arises through the people's consent,' is often uttered with the following meaning: That the bulk of a natural society about to become a political, or the inchoate subjects of an inchoate political government, promise, expressly or tacitly, to obey the future sovereign. The expression, however, as uttered with the meaning in question, confounds consent and pro-

sympathy with prejudice, and fear and reason with the preference of government to anarchy. A second glance, however, must convince us that the two authors are not thinking of quite the same thing. Mr. Bryce answers the question: Why do subjects obey laws? Austin answers the question: Why do subjects submit to government? The one has in mind the offence of the law-breaker; the other, the offence of the anarchist. Moreover, Mr. Bryce regards the individual citizen; Austin the community in general.

mise, and therefore is grossly incorrect. That the inchoate subjects of every inchoate government will or consent to obey it, is one proposition: that they promise, expressly or tacitly, to render it obedience, is another proposition. That the inchoate subjects of every inchoate government promise to render it obedience, is a position involved by an hypothesis which I shall examine in the next section.

The hypothesis of the original covenant.

379. The duties of the subjects towards the sovereign government, are partly religious, partly legal, and partly moral. The religious duties of the subjects towards the sovereign government, are creatures of the Divine law as known through the principle of utility. If the general good which probably would follow submission outweigh the general good which probably would follow resistance, the subjects are bound religiously to pay it habitual obedience, although it accomplish imperfectly its proper purpose or end.—The legal duties of the subjects towards the sovereign government, are creatures of positive laws which itself has imposed upon them.—The moral duties of the subjects towards the sovereign government, are creatures of positive morality. They mainly are creatures of laws (in the improper acceptance of the term) which the general opinion of the community itself sets to its several members.

380. The duties of the sovereign government towards the subjects are partly religious and partly moral. If it lay under legal duties towards the subjects, it were not a supreme, but were merely a subordinate government.

381. It follows from the foregoing analysis, that the duties of the subjects towards the sovereign government, with the duties of the sovereign government towards the subjects, originate respectively in three several sources: namely, the Divine law (as indicated by the principle of utility), positive law, and positive morality. And, to my understanding, it seems that we account sufficiently for the

origin of those obligations, when we simply refer them to those their obvious fountains. It seems to my understanding, that an ampler solution of their origin is not in the least requisite, and, indeed, is impossible. But there are many writers on political government and society, who are not content to account for their origin, by simply referring them to those their manifest sources. It seems to the writers in question, that we want an ampler solution of the origin of those obligations, or, at least, of the origin of such of them as are imposed by the law of God. And, to find that ampler solution which they believe requisite, those writers resort to the hypothesis of the *original covenant* or *contract*, or the *fundamental civil pact*.\*

381. Q. (1) Consider to what extent, if at all, a science of law is concerned with the following topics:—

- (a) The State's purpose;
- (b) The State's sphere of action;
- (c) The State's origin.

*Note.*—*The origin and justification of the State.*—Austin has now passed from the question of the motives which induce submission to government, to consider the nature of the duties between sovereign and subjects. These are seen to result from religion, law, or positive morality. In discussing the sections 375–80, we must distinguish between two great questions about which men have interested themselves in discussing the origin and cause of civil government:—

- (1) How the State came to be;
- (2) The right of the State to be; i.e. the right of the State to exercise authority over individual subjects.

Of these questions the one is historical, the other is philosophical. How does Austin answer them? He hardly affects to consider the first. He says by implication: "I find governments to be established as a fact, to be considered useful, and to be supported by popular opinion. How these things came to be? is a question that I, as a jurist, am not called upon to answer. If I *must* answer the question, I should say that the most important factor in the origin of society is a vague perception of the utility of society (cf. § 369). Force, though it must be present, prevails less by its own might than by virtue of the presence of a consciousness of advantages to be gained; and also by the power of custom, and the attraction of such unreflecting preferences as

382. By the writers who resort to it, this renowned and not exploded hypothesis is imagined and rendered variously. But the purport or effect of the hypothesis, as it is imagined and rendered by most of those writers, may be stated generally thus:

383. To the formation of every society political and independent, or to the institution of every πόλις or *civitas*, all its future members then in being are joint or concurring parties: for all are parties to an agreement in which it then originates, and which is also the basis whereon it afterwards rests. As being the necessary source of the independent political society, or as being a condition necessarily preceding its existence, this agreement of all is styled the original covenant: as being the necessary basis whereon the *civitas* afterwards rests, it is styled *pactum civile fundamentale*.—

loyalty to a chief" (cf. § 367). Two very serious objections may be urged against such an account. It gives no adequate expression to the enormous power exercised by Religion in the formation of the State; and it exaggerates the conscious element in early social evolution, almost ignoring the fact that the State is essentially a slow growth, a "gradual realization, in legal institutions, of the universal principles of human nature, and the gradual subordination of the individual side of that nature to the universal side."<sup>1</sup>

The second of the questions to which reference has been made, the justification of the State's exercise of authority over individual subjects, is a question to which Austin's answer may be inferred from his account of the end of government. In Austin's opinion, the State is justified by the useful purpose which it serves in promoting human happiness. The answer may be compared with that of T. H. Green, who held that the State is justified by the purpose which it serves in maintaining those conditions of freedom which are essential to the moral life.

The distinction between the two great questions of the State's origin and justification must be borne in mind. The theory of the original contract, to which Austin now proceeds, has been propounded as an answer to both questions.

In the process of making this covenant or pact, or the process of forming the society political and independent, there are three several stages which may be described in the following manner. 1. The future members of the community just about to be created, jointly resolve to unite themselves into an independent political society: signifying and determining withal the paramount purpose of their union, or even more or fewer of its subordinate or instrumental ends. And here I must briefly remark, that the paramount purpose of their union is the paramount purpose (let it be what it may) for which a society political and independent ought to be founded and perpetuated. By the writers who resort to the hypothesis, this paramount purpose or absolute end is conceived differently: their several conceptions of this purpose or end, differing with the several natures of their respective ethical systems. To writers who admit the system which I style the theory of utility, this purpose or end is the advancement of human happiness. To a multitude of writers who have flourished and flourish in Germany, the following is the truly magnificent though somewhat mysterious object of political government and society: namely, the extension over the earth, or over its human inhabitants, of the empire of right or justice. It would seem that this right or justice, like Ulpian's justice, is absolute, eternal, and immutable. It would seem that this right or justice is not a creature of law: that it was anterior to every law; exists independently of every law; and is the measure or test of all law or morality. Consequently, it is not the right or justice which is a creature of the law of God, and to which the name of 'justice' is often applied emphatically. It rather is a something, perfectly self-existent, to which his law conforms, or to which his law should conform. I, therefore, cannot understand it, and will not affect to explain it. Merely guessing at what it

may be, I take it for general utility darkly conceived and expressed. 2. Having resolved to unite themselves into an independent political society, all the members of the inchoate community jointly determine the constitution of its sovereign political government. In other words, they jointly determine the member or members in whom the sovereignty shall reside: and, in case they will that the sovereignty shall reside in more than one, they jointly determine the mode wherein the sovereign number shall share the sovereign powers. 3. The process of forming the independent political society, or the process of forming its supreme political government, is completed by promises given and accepted: namely, by a promise of the inchoate sovereign to the inchoate subjects, by promises of the latter to the former, and by a promise of each of the latter to all and each of the rest. The promise made by the sovereign, and the promises made by the subjects, are made to a common object. The sovereign promises generally to govern to the paramount end of the independent political society: and, if any of its subordinate ends were signified by the resolution to form it, the sovereign moreover promises specifically to govern specifically to those subordinate ends. The subjects promise to render to the sovereign a qualified or conditional obedience: that is to say, to render to the sovereign all the obedience which shall consist with that paramount purpose and those subordinate purposes.

384. The resolution of the members to unite themselves into an independent political society, is styled *pactum unionis*. Their determination of the constitution or structure of the sovereign political government, is styled *pactum constitutionis* or *pactum ordinationis*. The promise of the sovereign to the subjects, with the promises of the subjects to the sovereign and to one another, are styled *pactum subjectionis*: for, through the promises of the subjects, or

through the promises of the subjects coupled with the promise of the sovereign, the former are placed completely in a state of subjection to the latter, or the relation of subjection and sovereignty arises between the parties. But of the so-called *pact of union*, the so-called *pact constituent*, and the so-called *pact of subjection*, the last only is properly a convention. The so-called pact of union and the so-called pact constituent are properly resolves or determinations introductory to the pact of subjection: the pact of subjection being the original covenant or the fundamental civil pact.

385. Through this original covenant, or this fundamental pact, the sovereign is bound (at least religiously) to govern as is mentioned above: and the subjects are bound (at least religiously) to render to the sovereign for the time being, the obedience above described. And the binding virtue of this fundamental pact is not confined to the founders of the independent political society, but extends to the following members of the same community. For the promises which the founders of the community made for themselves respectively, import similar promises which they make for their respective successors.

386. In every society political and independent, it is held, the duties of the sovereign towards the subjects (or the religious duties of the sovereign towards the subjects) spring from an original covenant like that which I now have delineated: And the duties of the subjects towards the sovereign (or the religious duties of the subjects towards the sovereign) arise from a similar pact. Unless we suppose that such an agreement is incumbent on the sovereign and subjects, we cannot account adequately for those their respective obligations. Unless the subjects were held to render it by an agreement that they shall render it, the subjects would not be obliged, or would not be obliged



sufficiently, to render to the sovereign the obedience requisite to the accomplishment of the proper purpose or end of the society. Unless the sovereign were held by an agreement to govern as is mentioned above, the sovereign would not be obliged, or would not be obliged sufficiently, from governing despotically or arbitrarily: that is to say, governing with little or no regard to the proper purpose or end of a supreme political government.

387. Such, I believe, is the general purport of the hypothesis of the original covenant, as it is rendered by most of the writers who resort to it.

388. But, as I have remarked above, the writers who resort to the hypothesis imagine and render it variously.—According, for example, to some of those writers, The original subjects, covenanting for themselves and their followers, promise obedience to the original and following sovereigns. But the original sovereign is not a promising party to the fundamental civil pact. And by the different writers who render the hypothesis thus, the purport of the subjects' promises is imagined. For example: Some suppose that the obedience promised is qualified or conditional, whilst others suppose that it is passive or unlimited. But though the writers who resort to the hypothesis imagine and render it variously, they concur in this: That the duties of the subjects towards the sovereign (or the religious duties of the subjects towards the sovereign) are creatures of the original covenant. And the writers who fancy that the original sovereign was a promising party to the pact, also concur in this: That the duties of the sovereign towards the subjects (or the religious duties of the sovereign towards the subjects) are engendered by the same agreement.

389. A complete though concise exposition of the various forms or shapes in which various writers imagine and render the hypothesis, would fill a considerable volume. Besides,

the ensuing strictures apply exactly, or may be fitted easily, to any original covenant that has been or can be conceived; although they are directed more particularly to the fancied original covenant which I have delineated above. My statement of the purport of the hypothesis, I, therefore, conclude here. And I now will suggest shortly a few of the conclusive objections to which the hypothesis is open.

390. (1) To account for the duties of subjects towards their sovereign government, or for those of the sovereign government towards its subjects, is the scope of every writer who supposes an original covenant.—But we sufficiently account for the origin of those respective obligations, when we refer them simply to their apparent and obvious foundations: namely, the law of God, positive law, and positive morality.—Besides, although the formation of an independent political society were really preceded by a fundamental civil pact, scarce any of the duties lying thereafter on the subjects, or on the sovereign, would be engendered or influenced by that foregoing convention.—The hypothesis, therefore, of an original covenant, is needless, and is worse than needless. It affects to assign the cause of certain phenomena: but the cause assigned is superfluous inasmuch as there are other causes which are at once obvious and adequate, and inefficient inasmuch as it could not have produced the phenomena whereof it is the fancied source.

Criticism of original contract theory.  
(1) To account for duty of sovereigns and subjects, the hypothesis is needless and inappropriate.

391. It will appear from the following analysis, that, although the formation of an independent political society were really preceded by an original covenant, scarce any of the duties lying thereafter on the subjects, or of the duties lying thereafter on the sovereign, would be engendered or affected by that foregoing agreement. In other words, the covenant would hardly oblige (*legally, religiously, or morally*) the original or following subjects, or the original or following sovereigns.

(a) Does  
not bind  
legally.

392. Every convention which obliges legally (or every contract properly so called) derives its legal efficacy from a positive law. Speaking exactly, it is not the convention that obliges legally, or that engenders the legal duty: but the law obliges legally, or engenders the legal duty, through the convention. In other words, the positive law annexes the duty to the convention: or it determines that duties of the given class shall follow conventions of the given description.—Consequently, if the sovereign government were bound *legally* by the fundamental civil pact, the legal duty lying on the government were the creature of a positive law: and the positive law annexing the duty to the pact would be set to the sovereign government by another and superior sovereign. Consequently, the sovereign government legally bound by the pact would be in a state of subjection. —Through a positive law set by their own sovereign, the subjects might be bound legally to keep the original covenant. But the legal or political duty thus incumbent on the subjects, would properly proceed from the law set by their own sovereign, and not from the covenant itself. If they were bound legally to keep the original covenant, without a positive law set by their own sovereign, they would be bound through a positive law set by another sovereign: that is to say, they would be in a state of subjection to their own sovereign government, and also to a sovereign government conferring rights upon their own.

(b) Nor re-  
ligiously.

393. Again, if the sovereign or subjects were bound *religiously* by the fundamental civil pact, the religious duty lying on the sovereign, or the religious duty lying on the subjects, would properly proceed from the Divine law, and not from the pact itself.

394. Now the proper absolute end of an independent political society, and the nature of the index to the law of God, are conceived differently by different men. But

whatever be the absolute end of an independent political society, and whatever be the nature of the index to the law of God, the sovereign would be bound religiously, without an original covenant, to govern to that absolute end: whilst the subjects would be bound religiously, without an original covenant, to render to the sovereign the obedience which the accomplishment of the end might require. Consequently, whether it consisted or conflicted with that proper absolute end, the original covenant would not oblige religiously either of the two parties. If the original covenant consisted with that absolute end, the original covenant would be superfluous, and therefore inoperative. If the original covenant conflicted with that absolute end, it would also conflict with the law which is the source of religious obligations, and would not oblige religiously the sovereign government or its subjects.

395. And though the original sovereign or the original subjects might have been bound religiously by the original covenant, why or how should it bind religiously the following sovereigns or subjects? Why should obligations be laid on those following parties, through or in consequence of a pact made without their authority, and even without their knowledge? Legal obligations often lie upon parties (as, for example, upon heirs or administrators), through or in consequence of promises made by other parties whose legal representatives they are. It is expedient, for various reasons, that positive law should impose obligations on the makers of certain promises: and for the same, or nearly the same, reasons, it is expedient that the legal duties which are laid on the makers themselves, should pass to the parties who legally represent them, and who take their faculties or means. But I am unable to perceive, why or how a promise of the original sovereign or subjects should bind religiously the following sovereigns or subjects: Though I see that cases of

legal obligation to which I now have adverted, probably suggested the groundless conceit to those who advised the hypothesis of a fundamental civil pact.

(c) Nor  
morally.

396. If the sovereign were bound *morally* to keep the original covenant, the sovereign would be bound by opinions current amongst the subjects, to govern to the absolute end at which its authors had aimed: And if the subjects were bound *morally* to keep the original covenant, the subjects would be bound severally by opinions of the community at large, to render to the sovereign the obedience which the accomplishment of the end might require. But the moral obligations thus incumbent would not be imposed by the positive morality of the community, through or in consequence of the pact. For the opinions obliging the sovereign to govern to that absolute end, with the opinions obliging the subjects to render that requisite obedience, would not be consequents of the pact, but would have been its antecedents: inasmuch as the pact itself would have been made by the founders of the community, because those very opinions were held by all or most of them.

397. We may, if we like, imagine that the fancied original covenant was constructed with some particularity and precision: that, having determined the absolute end of their union, it specified some of the ends positive or negative, or some of the means or modes positive or negative, through which the sovereign government should rule to that absolute end. The founders, for example, of the independent political society (like the Roman people who adopted the Twelve Tables), might have adverted specially to the monstrous and palpable mischiefs of *ex post facto* legislation: and therefore the fancied covenant might have determined specially, that the sovereign government about to be formed should forbear from legislation of the kind. And if any of those positive or negative ends were specified by the original covenant, the

promise of the subjects to render obedience to the sovereign, was made with special reservations: it was not extended to any of the cases wherein the sovereign might deviate from any of the subordinate ends which the covenant determined specially.

398. Now, if an original covenant had determined clearly and precisely some of the subordinate ends whereto the sovereign should rule, the sovereign would be bound effectually by the positive morality of the community, to rule to the subordinate ends which the covenant had thus specified: supposing (I, of course, understand) that those same subordinate ends were favoured by opinions and sentiments which the mass of the subjects for the time being held and felt. And here (it might be argued) the sovereign would be bound morally to rule to those same ends, through the fundamental pact, or in consequence of the fundamental pact. For (it might be said) the efficacy of the opinions binding the sovereign government would mainly arise from the clearness and precision with which those same ends were conceived by the mass of the subjects; whilst the clearness and precision of their conceptions would mainly arise from the clearness and precision with which those same ends had been specified by the original covenant. It will, however, appear on a moment's reflection, that the opinions of the generality of the subjects, concerning those same ends, would not be engendered by but rather would have engendered the covenant. And, granting that the clearness with which they were specified by the covenant would impart an answering clearness to the conceptions of the following subjects, that effect on the opinions held by the following subjects would not be wrought by the covenant as being a *covenant or pact*: that is to say, as being a *promise, or mutual promises, proffered and accepted*. That effect would be wrought by the covenant as being a luminous statement of those

same subordinate ends. And any similar statement which might circulate widely (as a similar statement, for example, by a popular and respected writer), would work a similar effect on the opinions of the following subjects.

A possible  
exception.

399. The following (I think) is the only, or nearly the only case, wherein an original covenant, as being a covenant or pact, might generate or influence any of the duties lying on the sovereign or subjects.

400. It might be believed by the bulk of the subjects, that unless their sovereign government had *promised* so to govern, it would not be bound by the law of God, or would not be bound sufficiently by the law of God, to govern to what they esteemed its proper absolute end. It might be believed moreover by the bulk of the subjects, that the promise made by the original sovereign was a promise made in effect by each of the following sovereigns, and therefore that their sovereign government was bound religiously to govern to that absolute end, rather because it had so *promised* than by reason of the intrinsic worth belonging to the end itself.—Now, if the mass of the subjects potently believed these positions, the duties of the government towards its subjects, which the positive morality of the community imposed upon it, would be engendered or affected by the original covenant. They would be imposed upon it, wholly or in part, because the original covenant had preceded or accompanied the institution of the independent political society. For if it departed from any of the ends determined by the original covenant, the mass of its subjects would be moved to anger (and perhaps to eventual rebellion), by its breach of its *promise*, real or supposed, rather than by that misrule of which they esteemed it guilty.

401. It appears from the foregoing analysis, that, although the formation of the independent political society had really been preceded by a fundamental civil pact, none of the *legal*

or *religious* duties lying on the sovereign or subjects could be engendered or influenced by that preceding convention: that there is only a single case, or are only a few cases, wherein it could engender or influence any of the *moral* duties lying on the same parties. It will appear from the following analysis, that, where it might engender or influence any of those *moral* duties, that preceding convention would be useless or pernicious.

402. An original covenant would be simply useless, if it merely determined the absolute end of the sovereign political government: if it merely determined that the absolute end of the government was the greatest possible advancement of the common happiness or weal. For though the covenant might give uniformity to the opinions of the mass of the subjects, that uniformity would hardly influence the conduct of their sovereign political government.

403. But the covenant might specify some of the means through which the government should rule to that its absolute end. And as so doing, the original covenant would be simply useless, or positively pernicious.

404. If the covenant of the founders of the community did not affect the opinions of its following members, the covenant would be simply useless.

405. If the covenant of the founders of the community did affect the opinions of its following members, the covenant probably would be positively pernicious. The following members probably would impute to the subordinate ends specified by the original covenant, a worth extrinsic and arbitrary, or independent of their intrinsic merits. A belief that the specified ends were of a useful or beneficent tendency would not be their reason, or would not be their only reason, for regarding the ends with respect. They probably would respect the specified ends, or probably would partly respect them, because the venerable founders



of the independent political society had determined that those same ends were some of the ends or means through which the weal of the community might be furthered by its sovereign government. Now the venerable age or times wherein the community was founded, would probably be less enlightened than any of the ensuing and degenerate ages through which the community might endure. Consequently, the opinions held in an age comparatively ignorant, concerning the subordinate ends to which the government should rule, would unduly influence—through the medium of the covenant—the opinions held, concerning those ends, in ages comparatively knowing.

406. Let us suppose, for example, that the formation of the British community was preceded by a fundamental pact. Let us suppose that the ignorant founders of the community deemed foreign commerce hurtful to domestic industry, and that the government about to be formed promised for itself and its successors, to protect the industry of its own society, by forbidding and preventing the importation of foreign manufactures. Now if the fundamental pact made by our worthy ancestors were devoutly revered by many of ourselves, it would hinder the diffusion of sound economical doctrines through the present community. The present sovereign government would, therefore, be prevented by the pact, from legislating wisely and usefully in regard to our commercial intercourse with other independent nations. If the government attempted to withdraw the restrictions which the laws of preceding governments have laid on our foreign commerce, the fallacies which now are current, and the nonsense which now is in vogue, would not be the only fallacies, and would not be the only nonsense, wherewith the haters of improvement would belabour the audacious innovators. All who delighted in 'things ancient,' would certainly accuse it of infringing a principle which was part

of the very basis whereon the community rested: which the wise and venerable authors of the fundamental pact itself had formerly adopted and consecrated. Nay, the lovers of darkness would affirm, and probably would believe, that the government was incompetent to withdraw the restrictions which the laws of preceding governments have laid on our foreign commerce: that being, as it were, a privy of the first or original government, it was estopped by the solemn promise which that government had given.

407. Promises or oaths on the part of the original sovereign, or promises or oaths on the part of succeeding sovereigns, are not the efficient securities, moral or religious, for beneficent government or rule.—The best of moral securities, or the best of the securities yielded by positive morality, would arise from a wide diffusion, through the mass of the subjects, of the soundest political science which the lights of the age could afford. The best of religious securities, or the best of the securities yielded by religious convictions, would arise from worthy opinions, held by rulers and subjects, concerning the wishes and purposes of the Good and Wise Monarch, and concerning the nature of the duties which he lays upon earthly sovereigns.

408. (2) It appears from the foregoing strictures on the hypothesis of the original covenant, that the hypothesis is needless, and is worse than needless: that we are able to account sufficiently, without resorting to the hypothesis, for the duties of subjects towards their sovereign government, with the duties of the sovereign government towards its subjects; and that, though the formation of the independent political society had really been preceded by a fundamental civil pact, scarce any of those obligations would be engendered or influenced by that preceding agreement. It will appear from the following strictures, that the hypothesis of the fundamental pact is a fiction approaching to an impossi-

The real securities for beneficent government.

(2) The hypothesis is a fiction.

bility: that the formation of a society political and independent, was never preceded or accompanied, and could hardly be preceded or accompanied, by an original covenant properly so called, or by aught resembling the idea of a proper original covenant.

Essentials  
of a con-  
vention.

409. The main essentials of a convention are these: First, a *signification* by the promising party, of his *intention* to do the acts, or to observe the forbearances, which he promises to do or observe: secondly, a *signification* by the promisee, that he *expects* the promising party will fulfil the proffered promise. That this signification of intention and this signification of expectation are of the very essence of a proper convention or agreement, will appear on a moment's reflection.

410. The conventions enforced by a positive law or morality, are enforced legally or morally for various reasons. But of the various reasons for enforcing any convention, the following is always one.—Sanctions apart, a convention tends to raise in the mind of the promisee an expectation that its object will be accomplished: and to the expectation so raised, he naturally shapes his conduct. Now, as much of the business of human life turns or moves upon conventions, frequent disappointments of those expectations which conventions naturally excite, would render human society a scene of baffled hopes, and of thwarted projects and labours. To prevent disappointments of such expectations, is a main object of the legal and moral rules whose direct and appropriate purpose is the enforcement of pacts or agreements. But the promisee would not entertain the expectation, unless the corresponding intention were signified by the promising party: and, unless the existence of the expectation were signified by the promisee, the promising party would not be apprised of its existence, although the proffered promise had actually raised it. Without the signification of the intention,

there were no promise properly so called; without the signification of the expectation, there were no sufficient reason for enforcing the genuine promise which really may have been proffered.

411. It follows from the foregoing statement of the main essentials of a convention that an original covenant properly so called, or aught resembling the idea of a proper original covenant, could hardly precede the formation of an independent political society.

Essentials  
of a con-  
vention  
not  
present in  
origin of  
society.

412. According to the hypothesis of the original covenant, in so far as it regards the promise of the original sovereign, the sovereign promises to govern to the absolute end of the union (and, perhaps, to more or fewer of its subordinate or instrumental ends). And the promise is proffered to, and is accepted by, *all* the original subjects. According to the hypothesis of the original covenant, in so far as it regards the promise of the original subjects, they promise to render to the sovereign a passive and unlimited obedience, or they promise to render to the sovereign such a qualified obedience as shall consist with a given end or with given ends. And the promise of the subjects passes from *all* the subjects: from all and each of the subjects to the monarch or sovereign body, or from each of the subjects to all and each of the rest.

413. Now it appears from the foregoing statement of the main essentials of a convention, that the promise of the sovereign to the subjects would not be a covenant properly, unless the subjects *accepted* it. But the subjects could hardly accept it, unless they apprehended its object. Unless they apprehended its object, it hardly could raise in their minds any determinate expectation: and unless it raised in their minds a determinate expectation, they hardly could signify virtually any determinate expectation, or could hardly accept virtually the proffered promise. The signs of accept-

ance which might actually fall from them would be in reality unmeaning noise or show.—Now we know that the great majority, in any actual community, have no determinate notions concerning the absolute end to which their sovereign government ought to rule : or concerning the ends or means through which it should aim at the accomplishment of that its paramount purpose. It surely, therefore, were absurd to suppose, that all or many of the members of any inchoate community would have determinate notions (or notions approaching to determinateness) concerning the scope of their union, or concerning the means to its attainment. Consequently, most or many of the original subjects would not apprehend the object of the original sovereign's promise : and, not apprehending its object, they would not accept it in effect, although they might accept it in show.

414. The remarks which I now have made on the promise of the original sovereign, will apply, with a few adaptations, to the promise of the original subjects. If really they proffered to the sovereign (or if really they proffered to one another) that promise to render obedience which the hypothesis supposes or feigns, they would *signify* expressly or tacitly an *intention* of fulfilling it. But such a signification of intention could not be made by all of them, or even by most or many of them : for by most or many of them, the object of the fancied promise would not be apprehended determinately, or with a distant approach to determinateness.

415. If you would suppose an original covenant which as a mere hypothesis will hold water, you must suppose that the society about to be formed is composed entirely of adult members : that all these adult members are persons of sane mind, and even of much sagacity and much judgment : and that being very sagacious and very judicious, they also are perfectly familiar, or at least are passably acquainted, with political and ethical science. On these bare possibilities,

you may build an original covenant which shall be a coherent fiction.

416. It hardly is necessary to add, that the hypothesis of the original covenant, in any of its forms or shapes, has no foundation in actual facts. There is no historical evidence, that the hypothesis has ever been realized: that the formation of any society political and independent has actually been preceded by a proper original covenant, or by aught approaching to the idea.

417. In a few societies political and independent (as, for example, in the Anglo-American States), the sovereign political government has been determined at once, and agreeably to scheme or plan. But, even in these societies, the parties who determined the constitution (either as scheming or planning, or as simply voting or adopting it) were merely a slender portion of the whole of the independent community, and were virtually sovereign therein before the constitution was determined; insomuch that the constitution was not constructed by the whole of an inchoate community, but rather was constructed by a fraction of a community already consummate or complete.

418. In most societies political and independent, the constitution of the supreme government has *grown*. By which fustian but current phrase, I intend not to intimate that it hath come of itself, or is a marvellous something fashioned without hands: but that it has not been determined at once, or agreeably to a scheme or plan; that positive moral rules of successive generations of the community (and, perhaps, positive laws made by its successive sovereigns) have determined the constitution, with more or less of exactness, slowly and unsystematically. Consequently, the supreme government was not constituted by the original members of the society: Its constitution has been the work of a long series of authors, comprising the original members and

many generations of their followers. And the same may be said of most of the ethical maxims which the subjects constrain the sovereign to observe. These are not coeval with the independent political society, but rather have arisen insensibly since the society was formed.

419. In some societies political and independent, oaths or promises are made by rulers on their accession to office. But such an oath or promise, and an original covenant to which the original sovereign is a promising party, have little or no resemblance. That the formation of the society political and independent preceded the conception of the oath itself, is commonly implied by the terms of the latter. The swearing party, moreover, is commonly a limited monarch, or occupies some position like that of a limited monarch: that is to say, is merely a limb or member of a sovereign body.

420. It is said, however, by the advocates of the hypothesis (for the purpose of obviating the difficulty which these negative cases present), that a *tacit* original covenant preceded the formation of the society, although its formation was not preceded by an *express* covenant of the kind.

421. Now (as I have shown above) an actual signification of intention on the part of the promisor, with an actual acceptance of the promise on the part of the promisee, are of the very essence of a *genuine* convention or pact, be it express, or be it tacit. The only difference between an express, and a tacit or implied convention, lies in this: That, where the convention is express, the intention and acceptance are signified by language, or by signs which custom or usage has rendered equivalent to language: but that, where the convention is tacit or implied, the intention and acceptance are not signified by words, or by signs which custom or usage has made tantamount to words.\*

421. *Quasi-Contract*.—In a note to this paragraph, Austin traces the fallacy at present under discussion to a confusion of Implied

422. Most or many, therefore, of the members of the inchoate society, could not have been parties, as promisors or promisees, to a tacit original covenant. They could not have signified virtually the requisite intention or acceptance: for they could not have conceived the object (as I have shown above) with which, according to the hypothesis, an original covenant is concerned.

423. Besides, in many of the negative cases to which I now am adverting, the position and deportment of the original sovereign government, and of the bulk of the original subjects, exclude the supposition of a tacit original covenant. For example: Where the original government begins in a violent conquest, it scarcely promises tacitly, by its violences towards the vanquished, that it will make their weal the paramount end of its rule. And a tacit promise to render obedience to the intrusive and hated government, scarcely passes from the reluctant subjects. They presently

Contract with the Quasi-Contract of Roman Law. The former was a true agreement, although implied from conduct rather than expressed in words. The latter was no agreement at all. It was a name adopted by the Romans to cover a miscellaneous set of obligations which did not spring from agreement, express or implied. For example, if a Roman citizen voluntarily undertook to manage the business of an absentee without having been asked to do so, certain legal obligations sprang up between him and the absentee. These obligations were comparable in many respects to obligations arising from contract. They were said to arise, not *ex contractu*, but *quasi ex contractu*. As several authors have remarked, it is in this form that the theory of contract can be most easily adapted to the purposes of political discussion. The ruler, it may be urged, may not have promised to rule justly, the subjects may not have promised to obey, but the circumstances are such that no moral injustice is done in assuming such promises.<sup>1</sup> It must be obvious, however, that, the moment consent becomes fictitious, such philosophic merits as the Social Contract theory may have, cease to exist.

<sup>1</sup> Cf. Maine, "Ancient Law," pp. 344-7.



*will* to obey it, or presently *consent* to obey it, because they are determined to obey it, by their fear of its military sword. But the will or consent to obey it presently, to which they are thus determined, is scarcely a tacit promise to render it future obedience. They would kick with all their might against the intrusive government, if the military sword which it brandishes were not so long and fearful.

424. By the recent and present advocates of the hypothesis of the original covenant (who chiefly are German writers on political government and society), it commonly is admitted that original covenants are not historical facts: that an actual original covenant never preceded the formation of any actual society political and independent. But they zealously maintain, notwithstanding this sweeping admission, that the only sufficient basis of an independent political society is a fundamental civil pact. Their doctrine, therefore, touching the original covenant amounts to this: namely, that the original covenant hath not preceded the formation of *any* society political and independent: but that though it hath not preceded the formation of *any*, it yet precedeth inevitably the formation of *every*.—Such is a taste or sample of the high ideal philosophy which the Germans oppose exultingly to the philosophy of Bacon and Locke.

(3) No  
necessary  
connection  
between  
con-  
vention  
and duty.

425. (3) I close my strictures on the hypothesis of the original covenant, with the following remark: It would seem that the hypothesis was suggested to its authors, by one or another of these suppositions. 1. Where there is no convention, there is no duty. In other words, whoever is obliged, is obliged through a promise given and accepted. 2. Every convention is necessarily followed by a duty. In other words, wherever a promise is given and accepted, the promising party is obliged through the promise, let its object and tendency be what they may.—It is assumed, expressly or tacitly, by Hobbes, Kant, and others, that he who is

bound has necessarily given a promise, and that he who has given a promise is necessarily bound.

426. But both suppositions are grossly and obviously false.—Of religious, legal, and moral duties, some are imposed by the laws which are their respective sources, through or in consequence of conventions. But others are annexed to facts which have no resemblance to a convention, or to aught that can be deemed a promise. Consequently, a sovereign government might lie under duties to its subjects, and its subjects might lie under duties towards itself, though neither it nor its subjects were bound through a pact.—And as duties are annexed to facts which are not pacts or conventions, so are there pacts or conventions which are not followed by duties. Conventions are not enforced by divine or human law, without reference to their objects and tendencies. There are many conventions which positive morality reprobates: There are many which positive law will not sustain, and many which positive law actually annuls: There are many which conflict with the law of God, inasmuch as their tendencies are generally pernicious. Consequently, although the sovereign and subjects were parties to an original covenant, neither the sovereign nor subjects would of necessity be bound by it.\*

426. *The theory of the Social Contract.*—Huxley expresses a familiar fact when he says that doctrines do not necessarily die from being killed. The Social Contract theory, triumphantly slain by many generations of writers, *will* not die. It reappears, sometimes openly and shamelessly, sometimes in disguises more or less apparent. Herbert Spencer, while declaring that the hypothesis of a social contract as assumed by Hobbes or Rousseau was baseless, elaborated a theory of his own which was essentially one of contract. Society, he urged, is in principle the same as an incorporated body, and "the general principle underlying the right government of every incorporated body is that its members contract with each other severally to submit to the will of the majority in all matters concerning the fulfilment of the objects for which they

Govern-  
ments *de*  
*jure* and

427. From the origin or causes of political government and society, I pass to the distinction of sovereign governments into governments *de jure* and governments *de facto*.

are incorporated, but in no others."<sup>1</sup> Although in the case of political society there is no express deed of incorporation, such a deed is implicit. Its terms can be inferred by considering what would be the agreement into which citizens would now enter with practical unanimity.<sup>2</sup>

Whenever a social theory will thus insist upon reappearing from time to time, despite its complete logical refutation, it will be found to contain some important truths which deserve statement. Such truths underlie the despised doctrine of the Social Contract. The fact must be my chief excuse for supplementing Austin's admirable remarks by a brief reference to the following topics:—(1) The essential inadequacy of the doctrine; (2) The historic forms in which the doctrine has been expressed; (3) The underlying truths.

(1) *The essential inadequacy of the doctrine.*—The doctrine purports to be an explanation both of the origin of the State and of the source of the State's authority. As an explanation of the origin of political society, the doctrine really belongs to the age in which thinkers attempted to explain social origins by *a priori* speculation rather than by investigation of an actual past. Having determined how man, who is largely what he is by virtue of political institutions, would act if he were to be suddenly deprived of them, the inference was drawn that man must have so acted at the beginnings of social life. The fallacy is too apparent to call for refutation. As a matter of fact, the very idea of a contract as binding belongs to a comparatively advanced stage. Status, not contract, is the basis of primitive society. How unreal and fanciful is the world to which the Social Contract theory belongs is happily satirized by Huxley. "To listen to Locke, one would imagine that a general meeting of men living in the state of nature, having been called to consider the 'defects' of their condition, and somebody being voted to the tree (in the presumable absence of chairs), this earliest example of a constituent assembly resolved to form a governmental company, with strictly limited liability, for the purpose of defending liberty and property; and that they elected a director, or body of directors, to be known as the sovereign, for the purpose of carrying on that business, and no other whatsoever."<sup>3</sup>

The Social Contract theory as an explanation of the ground of

<sup>1</sup> "Man versus the State," p. 83.

<sup>2</sup> *Ibid.*, p. 85.

<sup>3</sup> "Method and Results," p. 407.

For the two topics are so connected, that the few brief remarks which I shall make on the latter, may be placed <sup>govern-  
ments de  
juncto.</sup> aply at the end of my disquisition on the former.

the State's authority, though less absurd, is equally untenable. It rests on the postulate that man is endowed with an abstract right to a freedom with which no interference can be justified save by assent on the part of the individual himself. Man, in other words, is looked upon as having rights independently of his relations to society, although it is only as a member of society that he has rights at all. However clever may be our logic, we cannot reach a working conception of the State on such lines. The State is an organic unity; the parts of which it is composed are largely what they are by virtue of their relation to the whole of which they are a part. To arbitrarily separate them from that whole is to deform them.<sup>1</sup>

(2) *The historic forms of the doctrine.*—The most famous forms of the doctrine are respectively associated with the names of Hobbes, Locke, and Rousseau. According to Hobbes, the inchoate subjects agree among themselves to surrender all rights to the sovereign. The sovereign is not a party to the contract, and, accordingly, no breach of covenant on the part of the sovereign is possible. "None of his subjects, by any pretence of forfeiture on his part, can be freed from subjection."<sup>2</sup> According to Locke, though paternal control may pass by insensible degrees into sovereign authority, the foundation of that authority rests, not in paternity, but in the consent of the governed.<sup>3</sup> Hence it can be no greater than that possessed by individuals in a state of nature, since nobody can transfer to another more power than he has in himself, and nobody in the state of nature can have more power over the life, liberty, and possession of another than is given him by the law of nature for the preservation of himself and the rest of mankind.<sup>4</sup> Hence the power of the sovereign is limited; and resistance to him is justified if he exceed those limits. The judge of such offences shall be the people, "for who shall be judge whether his trustee or deputy acts well and according to the trust reposed in him, but he who deposes him and must, by having deputed him, have still a power to discard him when he fails in his trust!"<sup>5</sup> According to Rousseau, society begins in a contract the clauses of which, though perhaps never formally enumerated, are everywhere the same, everywhere tacitly admitted and recognized.

<sup>1</sup> Cf. *infra* Excursus A, "The State."

<sup>2</sup> "Leviathan," cap. xxviii.

<sup>3</sup> "Second Discourse on Government," para. 76, 105, 110.

<sup>4</sup> *Ibid.*, par. 135.

<sup>5</sup> *Ibid.*, pp. 232, 240.

428. In respect of the distinction now in question, governments are commonly divided into three kinds: First, governments which are *de jure* and also *de facto*; secondly, governments which are *de jure* but not *de facto*;

"These clauses may be reduced to one, that is, the total alienation of each associate with all his rights to the entire community. . . . Each gives in common his person and all his force under the supreme direction of the general will, and is received as an indivisible part of the whole. . . . Each is sovereign as well as subject."<sup>1</sup> According to this view, a government which does not embrace the whole people cannot be a true sovereign, and its overthrow is only a change in the delegation of sovereign functions.

The foregoing theories call for no discussion in detail. It may be noted, however, that the theory of Hobbes finds expression for government but not for the State, while that of Rousseau finds an expression for the State but none that is adequate for the government. The path taken by Hobbes leads on to governmental despotism; that taken by Rousseau, to the despotism of majorities. While Locke may be said to have apprehended the existence both of the State and the government, his doctrine easily lends itself to an individualism of which the final outcome must be anarchy.<sup>2</sup>

(3) *The underlying truths in the Social Contract theory.*—In the first place, regarded as an explanation of social origins, the theory of the original contract expresses the highly important fact that society is something more than a spontaneous growth. It is a growth directed by the forethought of men. That the theory in question involves a grave exaggeration of the conscious element must be admitted; the fact need not blind us to its merit in insisting upon the presence of that element. In the second place, regarded as a philosophical account of the State's authority over the individual, the Social Contract theory affords an inadequate expression for the truth that the conception of rights is only attainable among men of whom each recognizes in others the claims that he makes for himself. "It is only through a recognition by certain men of a common interest, and through the expression of that recognition in certain regulations of their dealings with each other, that morality could originate, or any meaning be gained for such terms as 'ought' and 'right' and their equivalents."<sup>3</sup>

In the preceding paragraph, reference has been made to an element of truth in the Social Contract theory, regarded as a

<sup>1</sup> "The Social Contract," bk. I, chap. vi.

<sup>2</sup> Cf. Huxley, "Methods and Results," p. 419.

<sup>3</sup> T. H. Green, "Principles of Political Obligation," § 116.

thirdly, governments which are *de facto* but not *de jure*. A government *de jure* and also *de facto*, is a government deemed lawful, rightful or just, which receives presently habitual obedience from the bulk or generality of the members of the independent political community. A government *de jure* but not *de facto* (or more briefly a government *de jure*) is a government deemed lawful, rightful or just, which, nevertheless, has been supplanted or displaced. A government *de facto* but not *de jure* (or more briefly a government *de facto*) is a government deemed unlawful, wrongful or unjust, which, nevertheless, receives presently habitual obedience from the bulk of the community. A government supplanted or displaced, and not deemed lawful, is neither a government *de facto* nor a government *de jure*.

429. In respect of *positive law*, a sovereign political government which is established is neither lawful nor un-

philosophical expression of the ground of the authority of the *State*. In history, the theory has more often appeared as an expression of the ground of the authority of the *Ruler*. Regarded from this point of view, the theory is capable of being formulated so as to express the important truth that the Ruler sacrifices his claim to the obedience of the subjects when he fails to consult the interests of those subjects. The duties of obedience and protection are reciprocal.

The admission that a theory contains some elements of truth involves no justification of that theory. History abundantly illustrates the fact that opinions and beliefs, which have acquired a dominating influence by virtue of the truths which they contained, may, through their imperfections, bring destruction to the very cause in the interests of which they have been formulated. Man's poverty of language not only compels him to wait long for some expression for the truth he vaguely feels, but also menaces him at every step when once that expression has been found, for the reason that it is certain to be inadequate. His only safety lies in the constant re-examination of his intellectual equipment. Neither a sane socialist nor a sane individualist of our own day would build his social theory upon the basis of a social contract.

lawful: neither rightful nor wrongful: neither just nor unjust: neither *legal* nor *illegal*.

430. In every society political and independent, the actual positive law is a creature of the actual sovereign. Although it was positive law under foregoing sovereigns, it is positive law presently through the power and authority of the present supreme government. For though the present government may have supplanted another, and though the supplanted government be deemed the lawful government, the supplanted government is stripped of the might which is requisite to the enforcement of the law considered as positive law. Consequently, if the law were not enforced by the present supreme government, it would want the appropriate sanctions which are essential to positive law. To borrow the language of Hobbes, 'The legislator is he (not by whose authority the law was first made, but) by whose authority it continues to be law.'

431. Consequently an established sovereign government, in respect of the positive law of its own independent community, is neither lawful nor unlawful. If it were lawful or unlawful, by law of its own making, it were lawful or unlawful by its own appointment. Which is absurd.—And if it were lawful or unlawful, in respect of the positive law of another independent community, it were not an actual supreme, but an actual subordinate government. Which also is absurd.

432. In respect of the positive law of that independent community wherein it once was sovereign, a so-called government *de jure* but not *de facto*, is not, and cannot be, a lawful government: for the positive law of that independent community is now positive law by the authority of the government *de facto*. Being positive law by the authority of the government *de facto*, this positive law proscribes the supplanted government, and determines that attempts to

restore it are legal wrongs. The supplanted government, though deemed *de jure*, is unlawful.—In respect of the positive law of another independent community, a so-called government *de jure* but not *de facto*, is neither lawful nor unlawful. For if, in respect of this law, it were lawful or unlawful, it were lawful or unlawful by the appointment of the law-maker; that is to say, it were not an ousted supreme, but an ousted subordinate government.

433. In respect, then, of *positive law*, the distinction of sovereign governments into lawful and unlawful is a distinction without a meaning. For, as tried by this test, a so-called government *de jure* but not *de facto* cannot be lawful: And, as tried by the same test, a government *de facto* is neither lawful nor unlawful.

434. In respect, however, of *positive morality*, the distinction of sovereign governments into lawful and unlawful, is not without a meaning. If the opinions of the bulk of the community favour the government *de facto*, the government *de facto* is morally lawful in respect of the positive morality of that particular society. If the opinions of the bulk of the community be adverse to the government *de facto*, it is morally unlawful in respect of the same standard. The bulk, however, of the community, may regard it with indifference: or a large portion of the community may regard it with favour, whilst another considerable portion regards it with aversion. And, in either of these cases, it is neither morally lawful, nor morally unlawful, in respect of the positive morality of that independent community wherein it is established.—And what I have said of a government *de facto*, may also be said of a government not *de facto*.

435. And a government *de facto*, or a government not *de facto*, may be morally lawful, or morally unlawful, in respect of the positive morality which obtains between nations or states. Though positive international morality looks mainly at the possession, every government in possession



or every government *de facto*, is not acknowledged of course by other established governments. In respect, therefore, of positive international morality, a government *de facto* may be unlawful, whilst a government not *de facto* may be a government *de jure*.

436. A government, moreover, *de facto*, or a government not *de facto*, may be lawful or unlawful in respect of the law of God. Tried by the Divine law, as known through the principle of utility, a sovereign government *de facto* is lawfully a sovereign government, if the general happiness or weal requires its continuance: it is not lawfully sovereign, if the general happiness or weal requires its abolition. Tried by the Divine law, as known through the principle of utility, a government not *de facto* is yet a government *de jure*, if the general happiness or weal requires its restoration: a government not *de facto* is also not *de jure*, if the general happiness or weal requires its exclusion."

436. *Governments de jure and de facto.*—A sovereignty which exists in fact can only be said to be not *de jure*, if by *jus* we are thinking of something other than the law of the State, e.g., of Positive Morality or International Law. But since, for the purposes of jurisprudence, *jus* = the law of the State, the distinction is not tenable. In the highly developed modern state, however, the sovereign may not be identical with the government. In a Constitution where this differentiation is recognized, the distinction between the government *de jure* and the government *de facto* may have a meaning. If, for example, the government of a 'State', member of a Federal State, assumes the practical exercise of governmental functions which the constitution allots to the Federal government, such assumption might be described as government *de facto*, but not *de jure*.

Mr. Bryce, in a recent work, identifies sovereignty *de jure* with the legal sovereignty, and sovereignty *de facto* with political sovereignty, or, to quote his own expression, "Practical Mastery."<sup>1</sup> The terminology appears to me to be open to objection. Legal sovereignty is as much a matter of fact as political sovereignty. Legal sovereignty is both *de jure* and *de facto*; political sovereignty is *de facto* only. Or, to take a concrete example, the British Parliament is as much a matter of fact as the British electorate.

437. A positive law may be distinguished in the following manner. Every positive law (or every law simply and strictly so called) is set, directly or circuitously, by a sovereign individual or body, to a member or members of the independent political society wherein its author is supreme.

438. This definition of a positive law is assumed expressly or tacitly throughout the foregoing lectures. But it only approaches to a perfectly complete and perfectly exact definition. It is open to certain correctives which I now will briefly suggest.

439. Every law properly so called is set by a superior to an inferior or inferiors: It is set by a party armed with might, to a party or parties whom that might can reach. If the party to whom it is set could not be touched by the might of its author, its author would signify to the party a wish or desire, but would not impose a proper and imperative law. Now (speaking generally) a party who is obnoxious to a legal sanction, is a subject of the author of the law to which the sanction is annexed. But as none but members of the community wherein the law obtains are obnoxious to the legal sanction which enforces a positive law, the positive law is imposed exclusively on a member or members of that independent community. Although the positive law may affect to oblige strangers (or parties who are not members of that independent community), none but members of that independent community are virtually or truly bound by it.

440. Speaking, then, generally, we may say that a positive law is set or directed exclusively to a member or members of the community wherein its author is sovereign. But, in many cases, the positive law of a given independent community imposes a duty on a *stranger*: on a party who is not a member of the given independent community, or is only a member to certain limited purposes. For such, in these

cases, is the position of the stranger, that the imposition of the legal duty consists with the sovereignty of the government of which he is properly a subject. Although the legal duty is laid on one of its subjects, it is not laid on the foreign government itself: nor does the author of the law, by imposing the legal duty, exercise sovereign power in the community of the foreign government, or over one of its subjects as being one of its subjects.—For example: A party not a member of a given independent community, but living within its territory and within the jurisdiction of its sovereign, is bound or obliged, to a certain limited extent, by its positive law. Living within the territory, he is obnoxious to the legal sanctions by which the law is enforced. And the legal duties imposed upon him by the law are consistent with the sovereignty of the foreign government of which he is properly a subject. For the duties are not imposed upon the foreign government itself, or upon a party within its independent community: nor are they laid upon the obliged party as being one of its subjects, but as being a member, to certain limited purposes, of the community wherein he resides. Again: If a stranger not residing within the given community be the owner of land or moveables lying within its territory, a convention of the stranger, with any of its members or a stranger, may be enforced against him by its positive law. For if he be sued on the agreement, and judgment be given for the plaintiff, the tribunal may execute its judgment by resorting to the land or moveables, although the defendant's body is beyond the reach of its process. And this execution of the judgment consists with the sovereignty of the government of which the stranger is properly a subject. For the judgment is not executed against that foreign government, or within the independent community of which it is the chief: nor is it executed against the defendant as being one of its subjects, but as owning land or

moveables within the jurisdiction of the tribunal. If the judgment were executed within the jurisdiction of the foreign supreme government, the execution would wound the sovereignty of the foreign supreme government, unless the judgment were executed through its permission and authority. And if the judgment were executed through its permission and authority, the duty enforced against the defendant would be imposed in effect by the law of his own community: the law of his own community adopting the law of the other, by reason of a special convention between the respective governments, or of a rule of international morality which the governments acknowledge and observe.

441. The definition, therefore, of a positive law, which is assumed expressly or tacitly throughout the foregoing lectures, is not a perfectly exact definition. In the cases noted and exemplified in the last paragraph, a positive law obliges legally a person or persons *not* of the community wherein the author of the law is sovereign or supreme. Now, since the cases in question are omitted by that definition, the definition is too narrow. To render that definition complete or adequate, a comprehensive summary of these anomalous cases (or, perhaps, a full enumeration of these anomalous cases) must be tacked to the definition in the way of supplement. Moreover, since the definition is defective or inadequate, and is assumed expressly or tacitly throughout the foregoing lectures, the determination of the province of jurisprudence, which is attempted in those discourses, is not a perfectly complete and perfectly exact determination.

442. But a perfect determination of the province of jurisprudence is not the purpose of the foregoing lectures. Their purpose is merely to *suggest* the general character of the subject. That subject receives a more adequate exposition in my entire Course. The anomalous cases to which I have referred belong to the departments of my Course which

are concerned with the detail of the science. They hardly were appropriate matter for the foregoing *general* attempt to determine the province of jurisprudence: for the foregoing attempt to *suggest* the subject of the science, with as much of completeness and exactness as consist with generality and brevity.

Member-  
ship of a  
political  
society.

443. Defining sovereignty and independent political society, I have said that a given society is a society political and independent, if the bulk or generality of its members habitually obey the commands of a determinate and independent party.—But who are the members of a given society? By what characters, or by what distinguishing marks, are its members severed from persons who are not of its members? By the foregoing general definition of independent political society the questions which I now have suggested are not resolved or touched: And it may seem, therefore, that the foregoing general definition is not complete or adequate. But, for the following reasons, I believe that the foregoing definition, considered as a general definition, is, notwithstanding, complete or adequate: that a general definition of independent political society could hardly resolve the questions which I have suggested above.

444. (1) It is not through one mode, or it is not through one cause, that the members of a given society are subjects of the person or body sovereign therein. A person may be determined to a given society, by any of numerous modes, or by any of numerous causes: as, for example, by birth within the territory which it occupies; by birth without its territory, but of parents being of its members; by simple residence within its territory; or by naturalization.—Again: A subject member of one society may be, at the same time, a subject member of another. A person, for example, who is naturalized in one independent society, may yet be a member completely, or to certain limited purposes, of that independent

society which he affects to renounce: or a member of one society who simply resides in another, may be a member completely of the former society, and, to limited purposes, a member of the latter. Nay, a person who is sovereign in one society, may be, at the same time, a subject member of another. Such, for example, would be the plight of a so-called limited monarch, if he were monarch and autocrat in a foreign independent community.—Now if the foregoing definition of independent political society had affected to resolve the questions which I have suggested above, I must have discussed the topics which I have touched in the present paragraph. I must have gone from the generals into the detail of jurisprudence; and therefore I must have wandered from the proper purpose or scope of the foregoing general attempt to determine the province of the science.

445. (2) By a general definition of independent political society (or such a definition as is applicable to every society of the kind), I could not have resolved completely the questions suggested above, although I had discussed the topics touched in the last paragraph. For the modes through which persons are members of particular societies (or the causes by which persons are determined to particular societies) differ in different communities. These modes are fixed differently in different particular societies, by their different particular systems of positive law or morality. In some societies, for example, a person born of aliens within the territory of the community, is, *ipso jure*, or without an act of his own, a perfect member of the community within whose territory he is born; but in other societies, he is not a perfect member (or is merely a resident alien) unless he acquire the character by fulfilling certain conditions. (See the French Code, Article 9.) It therefore is only in relation to a given particular society that the questions suggested above can be completely resolved.

Restriction (a) on position that a sovereign cannot be bound legally.

446. I have assumed expressly or tacitly throughout the foregoing lectures that a sovereign government of one, or a sovereign government of a number in its collective and sovereign capacity, cannot be *bound legally*. In the sense with which I have assumed it, the position will hold universally. But it needs a slight restriction, or rather a slight explanation, which may be placed conveniently at the close of my present discourse.

447. It is true universally, that as being the sovereign of the community wherein it is sovereign, a sovereign government cannot be bound legally. But, as being a subject of a foreign supreme government (either generally or to certain limited purposes), it may be bound by laws (simply and etriotly so called) of that foreign supreme government. In the case which I now am supposing, the sovereign political government bound by positive laws bears two characters, or bears two persons: namely, the character or person of sovercign in its own independent society, and the character or person of subject in the foreign independent community. And in order to the existence of the case which I now am supposing, its two characters or two persons must be distinct in practice, as well as in name and show. For example, before the French Revolution, the sovereign government of the Canton of Bern had money in the English funds: And if the English law empowered it to hold lands, it might be the owner of lands within the English territory, as well as the owner of money in the English funds. Now, assuming that the government of Bern is an owner of lands in England, it also is subject to the legal duties with which property in land is saddled by the English law. But by its subjection to those duties, and its habitual observance of the law through which those duties are imposed, its sovereignty in its own Canton is not annulled or impaired. For the duties are incumbent upon it (not as governing there, but) as owning

lands here : as being, to limited purposes, a member of the British community, and obnoxious, through the lands, to the process of the English tribunals.

448. I have said in a preceding section, that a sovereign government of one, or a sovereign government of a number in its collective and sovereign capacity, cannot have *legal rights* (in the proper acceptation of the term) against its own subjects. In the sense with which I have advanced it, the position will hold universally. But it needs a slight restriction, or rather a slight explanation, which I now will state or suggest.

449. It is true universally, that against a subject of its own, as being a subject of its own, a sovereign political government cannot have legal rights. But against a subject of its own, as being generally or partially a subject of a foreign government, a sovereign political government may have legal rights. For example : Let us suppose that a Russian merchant is resident and domiciled in England : that he agrees with the Russian emperor to supply the latter with naval stores : and that the laws of England, or the English tribunals, lend their sanction to the agreement. Now, according to these suppositions, the emperor bears a right, given by the law of England, against a Russian subject. But the emperor has not the right through a law of his own, or against a Russian subject in that capacity or character. He bears the legal right against a subject of his own, through the positive law of a foreign independent society ; and he bears it against his subject (not as being his subject, but) as being, to limited purposes, a subject of a foreign sovereign.

(b) On position that a sovereign cannot have legal rights against its own subjects.



## CHAPTER VII

### ON THE USES OF THE STUDY OF JURISPRUDENCE

[In a prefatory note, Mrs. Austin relates that the matter which follows was taken chiefly from the opening lectures of the two courses delivered by Mr. Austin. The work of selection, arrangement and revision, was undertaken by Mrs. Austin, whose text I have adopted, save for the omission of less important sections. My own opinions upon the chief points discussed by Austin are given in the excursus on the Sciences of the Law.]

Proper  
subject of  
Jurispru-  
dence.

450. The appropriate subject of Jurisprudence, in any of its different departments, is positive law: Meaning by positive law (or law emphatically so called), law established or 'positum,' in an independent political community, by the express or tacit authority of its sovereign or supreme government.

451. Considered as a whole, and as implicated or connected with one another, the positive laws and rules of a particular or specified community, are a system or body of law. And as limited to any one of such systems, or to any of its component parts, jurisprudence is particular or national.

452. Though every system of law has its specific and characteristic differences, there are principles, notions, and distinctions common to various systems, and forming analogies or likenesses by which such systems are allied.

453. Many of these common principles are common to all systems;—to the scanty and crude systems of rude societies, and the ampler and maturer systems of refined communities. But the ampler and maturer systems of refined communities

are allied by the numerous analogies which obtain between all systems, and also by numerous analogies which obtain exclusively between themselves. Accordingly, the various principles common to maturer systems (or the various analogies obtaining between them), are the subject of an extensive science: which science (as contradistinguished to national or particular jurisprudence on one side, and, on another, to the science of legislation) has been named General (or comparative) Jurisprudence, or the philosophy (or general principles) of positive law.

454. As principles abstracted from positive systems are the subject of general jurisprudence, so is the exposition of such principles its exclusive or appropriate object. With the goodness or badness of laws, as tried by the test of utility (or by any of the various tests which divide the opinions of mankind), it has no immediate concern. If, in regard to some of the principles which form its appropriate subject, it adverts to considerations of utility, it adverts to such considerations for the purpose of explaining such principles, and not for the purpose of determining their worth. And this distinguishes the science in question from the science of legislation: which affects to determine the test or standard (together with the principles subordinate or consonant to such test) by which positive law ought to be made, or to which positive law ought to be adjusted.

455. If the possibility of such a science appear doubtful, it arises from this; that in each particular system, the principles and distinctions which it has in common with others, are complicated with its individual peculiarities, and are expressed in a technical language peculiar to itself. It is not meant to be affirmed that these principles and distinctions are conceived with equal exactness and adequacy in every particular system. In this respect different systems differ. But, in all, they are to be found more or less nearly conceived; from the rude con-

ceptions of barbarians, to the exact conceptions of the Roman lawyers or of enlightened modern jurists.

456. I mean, then, by General Jurisprudence, the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law: understanding by systems of law, the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instruction.

457. Of the principles, notions, and distinctions which are the subjects of general jurisprudence, some may be esteemed necessary. For we cannot imagine coherently a system of law (or a system of law as evolved in a refined community), without conceiving them as constituent parts of it.

458. Of these necessary principles, notions, and distinctions, I will suggest briefly a few examples.

1°. The notions of Duty, Right, Liberty, Injury, Punishment, Redress; with their various relations to one another, and to Law, Sovereignty, and Independent Political Society:

2°. The distinction between written or promulgated, and unwritten or unpromulgated law, in the juridical or improper senses attributed to the opposed expressions; in other words, between law proceeding immediately from a sovereign or supreme maker, and law proceeding immediately from a subject or subordinate maker (with the authority of a sovereign or supreme):

3°. The distinction of Rights, into rights availing against the world at large (as, for example, property or dominion), and rights availing exclusively against persons specifically determined (as, for example, rights from contracts):

4°. The distinction of rights availing against the world at large, into property or dominion, and the variously restricted rights which are carved out of property or dominion:

5°. The distinction of Obligations (or of duties corre-

sponding to rights against persons specifically determined) into obligations which arise from contracts, obligations which arise from injuries, and obligations which arise from incidents that are neither contracts nor injuries, but which are styled analogically obligations 'quasi ex contractu.'

6°. The distinction of Injuries or Delicts, into civil injuries (or private delicts) and crimes (or public delicts); with the distinction of civil injuries (or private delicts) into torts, or delicts (in the strict acceptance of the term), and breaches of obligations from contracts, or of obligations 'quasi ex contractu.'

459. It will, I believe, be found, on a little examination and reflection, that every system of law (or every system of law evolved in a refined community) implies the notions and distinctions which I now have cited as examples; together with a multitude of conclusions imported by those notions and distinctions, and drawn from them, by the builders of the system, through inferences nearly inevitable.

460. Of the principles, notions, and distinctions which are the subjects of General Jurisprudence, others are not necessary (in the sense which I have given to the expression). We may imagine coherently an expanded system of law, without conceiving them as constituent parts of it. But as they rest upon grounds of utility which extend through all communities, and which are palpable or obvious in all refined communities, they in fact occur very generally in matured systems of law; and therefore may be ranked properly with the general principles which are the subjects of general jurisprudence.

461. Such, for example, is the distinction of law into 'jus personarum' and 'jus rerum': the principle of the scientific arrangement given to the Roman Law by the authors of the elementary or institutional treatises from which Justinian's

Institutes were copied and compiled. The distinction, I believe, is an arbitrarily assumed basis for a scientific arrangement of a body of law. But being a commodious basis for an arrangement of a body of law, it has been very generally adopted by those who have attempted such arrangements in the modern European nations. It has been very generally adopted by the compilers of the authoritative Codes which obtain in some of those nations, and by private authors of expository treatises on entire bodies of law. Nay, some who have mistaken the import of it, and who have contemptuously rejected it, as denoted by the obscure antithesis of 'jus personarum et rerum,' have yet assumed it under other (and certainly more appropriate) names, as the basis of a natural arrangement. Meaning, I presume, by a natural arrangement, an arrangement so commodious, and so highly and obviously commodious, that any judicious methodiser of a body of law would naturally adopt it.

Legisla-  
tion and  
Jurispru-  
dence.

462. The word Jurisprudence itself is not free from ambiguity; it has been used to denote—

The knowledge of Law as a science, combined with the art or practical habit or skill of applying it; or, secondly,

Legislation;—the science of what *ought to be done* towards making good laws, combined with the art of doing it.

Inasmuch as the knowledge of what ought to be, supposes a knowledge of what is, legislation supposes jurisprudence, but jurisprudence does not suppose legislation. What laws have been and are, may be known without a knowledge of what they ought to be.

Inevitable  
(and some-  
times in-  
tentional)  
implica-  
tion of  
Legisla-

463. It is impossible to consider Jurisprudence quite apart from Legislation; since the inducements or considerations of expediency which lead to the establishment of laws, must be adverted to in explaining their origin and mechanism. If the causes of laws and of the rights and obligations which

they create be not assigned, the laws themselves are unintelligible.

tion with  
Jurispru-  
dence.

464. Where the subject is the same, but the provisions of different systems with respect to that subject are different, it is necessary to assign the causes of the difference: whether they consist in a necessary diversity of circumstances, or in a diversity of views on the part of their respective authors with reference to the *ends* of Law. Thus, the rejection or limited reception of entails in one system, and their extensive reception in another, are partly owing to the different circumstances in which the communities are placed;—partly to the different views of the aristocratic and democratic legislators by whom these provisions have been severally made.

465. So far as these differences are inevitable—are imposed upon different countries—there can be no room for praise or blame. Where they are the effect of choice, there is room for praise or blame; but I shall treat them not as subjects of either, but as *causes* explaining the existence of the differences. So of the admission or prohibition of divorce—Marriages within certain degrees, &c. Wherever an opinion is pronounced upon the merits and demerits of Law, an impartial statement of the conflicting opinions should be given. The teacher of Jurisprudence may have, and probably has, decided opinions of his own; but it may be questioned whether earnestness be less favourable to impartiality than indifference; and he ought not to attempt to insinuate his opinion of merit and demerit under pretence of assigning causes.

466. Attempting to expound the principles which are the subject of the science of Jurisprudence (or rather to expound as many of them as a limited Course of Lectures will embrace), he must not only try to state them in general or abstract expressions, but must also endeavour to illustrate

them by examples from particular systems: especially by examples from the law of England, and from the Roman or Civil Law.

Value of  
the Study  
of Roman  
Law.

467. For the following sufficient reason (to which many others might be added), the Roman or Civil Law is, of all particular systems, other than the Law of England, the best of the sources from which such illustrations might be drawn. In most of the nations of modern continental Europe, much of the substance of the actual system, and much of the technical language in which it is clothed, is derived from the Roman Law, and without some knowledge of the Roman Law the technical language is unintelligible; whilst the order or arrangement commonly given to the system, imitates the exemplar of a scientific arrangement which is presented by the Institutes of Justinian. Even in our own country, a large portion of the Ecclesiastical and Equity, and some (though a smaller) portion of the Common Law, is derived immediately from the Roman Law, or from the Roman Law through the Canon. Nor has the influence of the Roman Law been limited to the positive law of the modern European nations. For the technical language of this all-reaching system has deeply tintured the language of the international law or morality which those nations affect to observe. By drawing, then, largely for examples on the Roman or Civil Law, an expositor of General Jurisprudence (whilst illustrating his appropriate subject) might present an idea of a system which is a key to the international morality, the diplomacy, and to much of the positive law, of modern civilized communities.

468. It is much to be regretted that the study of the Roman Law is neglected in this country, and that the real merits of its founders and expositors are so little understood. Much has been talked of the philosophy of the Roman Institutional writers. Of familiarity with Grecian philosophy

there are few traces in their writings, and the little that they have borrowed from that source is foolishness: for example, their account of *Jus naturale*, in which they confound law with animal instincts; law, with all those wants and necessities of mankind which are causes of its institution.

469. Nor is the Roman Law to be resorted to as a magazine of legislative wisdom. The great Roman Lawyers are, in truth, expositors of a positive or technical system. Not Lord Coke himself is more purely technical. Their real merits lie in their thorough mastery of that system; in their command of its principles; in the readiness with which they recall, and the facility and certainty with which they apply them.

470. In support of my own opinion of these great writers I shall quote the authority of two of the most eminent Jurists of modern times.

'The permanent value of the *Corpus Juris Civilis*,' says Falck, 'does not lie in the Decrees of the Emperors, but in the remains of juristical literature which have been preserved in the Pandects. Nor is it so much the matter of these juristical writings, as the scientific method employed by the authors in explicating the notions and maxims with which they have to deal, that has rendered them models to all succeeding ages, and pre-eminently fitted them to produce and to develop those qualities of the mind which are requisite to form a Jurist.'

And Savigny says, 'It has been shown above, that, in our science, all results depend on the possession of leading principles; and it is exactly this possession upon which the greatness of the Roman Jurists rests. The notions and maxims of their science do not appear to them to be the creatures of their own will; they are actual beings, with whose existence and genealogy they have become familiar



from long and intimate intercourse. Hence their whole method of proceeding has a certainty which is found nowhere else except in mathematics; and it may be said without exaggeration, that they calculate with their ideas. If they have a case to decide, they begin by acquiring the most vivid and distinct perception of it, and we see before our eyes the rise and progress of the whole affair, and all the changes it undergoes. It is as if this particular case were the germ whence the whole science was to be developed. Hence, with them, theory and practice are not in fact distinct; their theory is so thoroughly worked out as to be fit for immediate application, and their practice is uniformly ennobled by scientific treatment. In every principle they see a case to which it may be applied; in every case, the rule by which it is determined: and, in the facility with which they pass from the general to the particular and the particular to the general, their mastery is indisputable.'

471. In consequence of this mastery of principles, of their perfect consistency ('*elegantia*'), and of the clearness of the method in which they are arranged, there is no positive system of law which it is so easy to seize as a whole. The smallness of its volume tends to the same end. The principles themselves, many of them being derived from barbarous ages, are indeed ill fitted to the ends of law; and the conclusions at which they arrive being logical consequences of their imperfect principles, necessarily partake of the same defect.

Uses of the  
Study of  
Jurispru-  
dence.

472. Having stated generally the nature of the science of Jurisprudence, and also the manner in which I think it ought to be expounded, I proceed to indicate briefly a few of its possible uses.

473. I would remark, in the first place, that a well-grounded study of the principles which form the subject of the science, would be an advantageous preparative for the

study of English Law. To the student who begins the study of the English Law, without some previous knowledge of the *rationale* of law in general, it naturally appears an assemblage of arbitrary and unconnected rules. But if he approached it with a well-grounded knowledge of the general principles of jurisprudence, and with the map of a body of law distinctly impressed upon his mind, he might obtain a clear conception of it (as a system or organic whole), with comparative ease and rapidity. With comparative ease and rapidity, he might perceive the various relations of its various parts; the dependence of its minuter rules on its general principles; and the subordination of such of these principles as are less general or extensive, to such of them as are more general, and run through the whole of its structure.

474. In short, the preliminary study of the general principles of jurisprudence, and the mental habits which the study of them tends to engender, would enable him to acquire the principles of English jurisprudence, in particular, far more speedily and accurately than he possibly could have acquired them, in case he had begun the study of them without the preparative discipline.

475. There is (I believe) a not unprevalent opinion, that the study of the science whose uses I am endeavouring to demonstrate, might tend to disqualify the student for the *practice* of the law, or to inspire him with an aversion from the practice of it. That some who have studied this science have shown themselves incapable of practice, or that some who have studied this science have conceived a disgust of practice, is not improbably a fact. But in spite of this seeming experience in favour of the opinion in question, I deny that the study itself has the tendency which the opinion imputes to it. A well-grounded knowledge of the general principles of jurisprudence helps, as I have said, to a well-grounded knowledge of the principles of English jurispru-

dence; and a previous well-grounded knowledge of the principles of English jurisprudence, can scarcely incapacitate the student for the acquisition of practical knowledge in the chambers of a conveyancer, pleader, or draftsman. Armed with that previous knowledge, he seizes the *rationale* of the practice which he there witnesses and partakes in, with comparative ease and rapidity; and his acquisition of practical knowledge, and practical dexterity and readiness, is much less irksome than it would be in case it were merely empirical. Insomuch, that the study of the general principles of jurisprudence, instead of having any of the tendency which the opinion in question imputes to it, has a tendency (by ultimate consequence) to qualify for practice, and to lessen the natural repugnance with which it is regarded by beginners.

476. And as a well-grounded knowledge of the science whose uses I am endeavouring to demonstrate, would facilitate to the student the acquisition of the English law, so would it enable him to apprehend, with comparative ease and rapidity, almost any of the foreign systems to which he might direct his attention. So numerous, as I have said, are the principles common to systems of law, that a lawyer who has mastered the law which obtains in his own country, has mastered implicitly most of the substance of the law which obtains in any other community. So that the difficulty with which a lawyer, versed in the law of his own country, apprehends the law of another, is rather the result of differences between the terms of the systems, than of substantial or real differences between their maxims and rules.

477. Now the obstacle to the apprehension of foreign systems which is opposed by their technical language, might in part be obviated or lightened to the student of General Jurisprudence, if the science were expounded to him competently, in the method which I shall endeavour to observe.

If the exposition of the science were made agreeably to that method, it would explain incidentally the leading terms, as well as the leading principles, of the Roman or Civil Law. And if the student were possessed of those terms, and were also grounded thoroughly in the law of his own country, he would master with little difficulty the substance of the Roman system, and of any of the modern systems which are mainly derivatives from the Roman.

## PART II

### EXCURSUS A

#### THE STATE

The State  
a social  
group.

501. "It is a fact which has received far too little notice from English lawyers," writes Professor Dicey, "that, whenever men act in concert for a common purpose, they tend to create a body which, from no fiction of law, but from the very nature of things, differs from the individuals of whom it is constituted."<sup>1</sup> To some this may seem a strange saying. Yet it contains a truth of the first importance which we must take full account of, if we are to make satisfactory progress in the direction of a theory of the State which will serve the purposes of a reflective jurisprudence. For the State is but one of the many forms in which the associative tendency of mankind finds expression. Before we can form a theory about it, we must consider the nature of social groups in general.

English  
law and  
the social  
group.

502. How has law regarded social groups in the past? Towards the great majority of them, English law has assumed an attitude of mere tolerance. It has not forbidden or attempted to crush them, as it might have done; it has simply ignored them. But at times and places, this attitude of mere tolerance has not been possible. Some sort of recognition, of some sorts of groups, has become increasingly neces-

<sup>1</sup> "Law and Opinion in England," p. 153.

sary as man has become more and more a social being. One form of such recognition has been to attribute a representative capacity to certain individuals who act in behalf of the groups. The Crown has been a convenient scapegoat for national sins; the trustees of a nonconformist chapel have stood in law for the nonconformist congregation. In so far as legal recognition of groups is relevant to our present purposes, however, it has taken the form of a theory of corporations. This theory may be summarized very briefly in four propositions.

503. (1) A corporation is something distinct from the individual persons who constitute it. The position is too obvious to need proof. The whole is more than its parts. The individual members of a mining company have no immediate right of property in the mine or the machinery, and if any one of them should presume to act as owner, he would be liable to civil action as an ordinary trespasser. It is of more practical importance to point out, for the sake of the uninitiated, that the persons who constitute the corporation are not necessarily coincident with two other classes of persons who are directly associated with it, viz.: (a) Those persons through whom the corporation acts, (b) those persons in whose interests the corporation exists. The former are often called representatives, the latter beneficiaries. In a typical municipal corporation, the members are the mayor, aldermen, and burgesses of the borough; the beneficiaries are the inhabitants of the borough; and the "representatives" are the mayor, aldermen, and town councillors. In an ordinary mining company, the members, and also the beneficiaries, are the shareholders; whilst, for most purposes, the "representatives" are the directors. Both members and "representatives" of corporations are living persons—I speak throughout of corporations aggregate as distinct from corporations sole—whilst the beneficiaries may be, as in the

Corporation and members.

case of the University of Cambridge, an indeterminate body embracing present and future generations.

Corpora-  
tion v.  
sum of  
members.

504. (2) A corporation is, in the eye of the law, distinct from the sum of its members. This fact received an interesting illustration in Roman law. In that system, although the torture of a slave as a means of extorting information against his master was prohibited, the slave of a corporation might be tortured as a means of gaining information against any or all of its *individual members*. As regards English law, the following illustrations may be quoted:

(a) Each of the members of a corporation may be solvent whilst the corporation itself is insolvent.

(b) The very same persons who have registered themselves as one company may also register themselves as another and quite distinct company. If the corporation were identical with the sum of its members they would be one company, but the law holds them two.

(c) The corporation remains the same, although its personnel changes entirely. It is a totality of which the parts are constantly changing without affecting the continuity of the totality itself.

(d) Finally, the corporation is no mere partnership. Thus, partners are, whilst corporators need not be, liable for the debts of the group. Partners own, whilst corporators do not own, the group property. A partnership possesses a practically unrestricted power in dealings with third parties, while a corporation is ordinarily limited by reference to the purposes for which it is incorporated. Finally, whilst partnership can be resolved into mere contract, a corporation implies a new status, "Contract, that greediest of legal categories," writes Professor Maitland, "which once wanted to devour the state, resents being told that it cannot painlessly digest even a joint-stock company."<sup>1</sup>

<sup>1</sup> "Political Theories of the Middle Age," p. xxiv.

505. (3) The corporation is a legal subject of right and duties. If the law recognizes a distinction between a corporation and the sum of its members, it is not as a mere flight of fancy, or to indulge an inclination for metaphysics, but for the very practical and sufficient purpose of establishing the inherence of certain rights and duties which cannot be conveniently treated—or perhaps cannot be treated at all—as inhering in the members of the corporation. The property of a corporation follows the fate of the corporation, whatever that may be, not the fate of its members, whatever that may be. It is the corporation (not the members) which is creditor and debtor.

506. (4) The corporation is, therefore, in law a person. The cardinal distinction of jurisprudence is between rights or duties, and the holders or subjects of rights or duties. Such subjects are persons in law. This does not mean that they are not also persons in fact, a suggestion which might occur to the layman who has a mother-in-law who, by the way, is a mother neither in fact nor in law. It will be obvious that while some human beings (e.g. slaves) are not persons, some persons are not human beings. Wherever the law attributes rights or duties to an entity or institution, it makes a person, or recognizes a person in, that entity or institution. It becomes important, therefore, to distinguish between different kinds of persons in law. When the person in law is also a human being, it is called a natural person; when it is not a human being, it is sometimes called an artificial person. We have hitherto considered how the law regards that so-called artificial person which we know as the corporation. We have now to look behind legal rules to the nature of things, and to consider whether, in distinguishing between the corporation and the sum of its members, the law is merely employing a serviceable fiction, or is building on certain real and deep analogies



to natural personality which exist wholly apart from legal recognition.

Unity of  
the social  
group.

507. The inquiry is one which leads us on from the subject of corporations to the wider subject of human association in general. Of this wider subject it is necessary to speak for a moment. Whenever men act in common, they inevitably tend to develop a spirit which is something different from themselves taken singly or in sum. No one who has had any experience as a member of a governing body, for example, can be ignorant of the fact that the decisions of such a body, even when they are unanimous, are often inexplicable if regarded from the point of view of the several characters of the individual members considered as so many units. When at a meeting of such a board, a speaker begins with the statement, "I speak as a member of this board, and I say——," there will be reason to anticipate statements or proposals which represent the traditional policy of the board rather than the person who makes them. Under the inspiration of *esprit de corps*, the humane will give a cruel decision, the cruel a humane. In every group of men acting together for a common purpose, the common purpose inevitably begets a common spirit which is real, though it may be vague and indefinite to us because our vision is limited, or because the group is in the making. The group becomes, or tends to become, a unit; and, as Bluntschli so well said, a mere sum of individuals as such can no more become a unit than a heap of sand can become a statue. So a symphony is something more than a mere concurrence of sounds, and a cathedral than stone and mortar. As regards the human group, in proportion as the psychical realities which inspire it become distinct and emphatic, so is the efficiency of the group increased, and its purpose promoted.

The group  
in action.

508. The unity of spirit and purpose just referred to is

developed by continuous action in common. It is not so obvious, though quite as true, that the same unity tends to beget a different kind of action—the action of some in behalf of all. As psychical realities in the individual find means of expression in individual action, so psychical realities in the group find means of expression in corporate action. But the individual is a natural organism with predetermined organs for expressing the individual will. The group is not a natural organism, and numberless difficulties have to be overcome when the group-mind seeks realization in the external world. The difficulties will be overcome somehow, though possibly the group may never pass beyond the stage when action of the whole is only possible by combined action of each of the parts. In all highly developed groups, however, some one person, or a number of persons, acquires a capacity to express in action the will of the group. If we may employ an extremely useful and suggestive analogy, he or they are the organ of the group for the purpose of giving external expression to the corporate will. Inevitably, such expression lacks the directness and spontaneity which exist in the case of the individual; but the group-purpose is promoted in proportion as such directness and spontaneity are approached. The member of a highly developed group is thus part of a new power or force. For this privilege, however, he forgoes something of his own liberty of action. In becoming a member of an organized whole, he loses *apparently* something of his significance as a unit. He ceases to become a member of an undisciplined mob that he may become a soldier in a disciplined army.

509. The realities of group life may be found in every Group to a degree of intensity. They take their beginning wherever <sup>beginnings.</sup> two individuals act in a common undertaking. Each individual takes to every group with which he associates

something of the group spirit with which inheritance and circumstance have endowed him. In every group sufficiently organized to act as a group, there exist, though at different degrees of development, the phenomena which justify us in regarding society as an organic whole. Law is not in haste to recognize the fact; but when the group is large and its organization complex, and more especially when it assumes the responsibility of owning property, recognition becomes more and more urgent. As a member of such a group, the individual is affected, however slightly, yet to some extent; qualities are developed in him which cannot be explained save by reference to the union. More obviously, the group itself is something which cannot be analysed into the mere sum of its parts. The sum of the parts may survive the destruction of the group, but can no more explain the group than the material of a murdered organism explains the organism.

The corporation.

510. I return to the legal view of human groups, as that view is presented to us in the theory of corporations. The corporation is a group recognized as such by law. The psychic bonds to which I have referred as existing in all social groups, derive an added reality and efficiency from the mere fact of legal recognition. Differences of opinion and aim may exist within the group, but there is at least one will which may be assumed to be general, the will to continue the collective work. The corporation, in a word, is an efficiently organized unity which the State has recognized. To it, as we have seen, the law ascribes a distinctive existence, a capacity for right and duty, a personality. This personality differs from the personalities of the natural persons composing it, but shares with them the important characteristic of being based on a pre-existing capacity for will and action. In view of this capacity, it is difficult to hold, as traditional theory in England professes to

hold, that the law, in distinguishing between the corporation and the sum of its members, is merely employing a serviceable fiction. The difficulty becomes each year more obvious, owing to the enormous development of associated activities. We may readily ignore what we see seldom or in incipient stages; what appears before us at every moment and at highly developed stages, refuses to be ignored. To the moderns it is becoming increasingly clear that "the something more than the sum of its members" which the State implicitly recognizes as a person, is no mere creation of the juristic imagination, but is rather a reality as indisputable as man himself.

511. The real character of corporate personality is suggested by certain facts in the early history of corporations Early history of corporations. in England. The chief attributes of the corporation, such as perpetual succession, the right to sue and be sued by name, to purchase lands, to have a common seal and to make by-laws, were long recognized before the conception of the corporation was thought of. Their attainment marked stages which corresponded to the developments of social life rather than of juristic thought. "All the ancient boroughs of England, or nearly all," wrote Stubbs, "must have possessed all the rights of corporations and been corporations by prescription long before the reign of Henry VI; and the acquisition of a formal charter of incorporation could only recognize, not bestow, these rights."<sup>1</sup> So far from the corporation having been the creature of the law, we ought rather to regard it as an entity which has compelled the law to grant it official recognition. Acting as a person, it has compelled law to regard it as a person. The function of the State in the matter has been permissive and regulative 113. rather than creative. The relation suggests the judicial

<sup>1</sup> 'Constitutional History of England,' iii.

adoption of a social usage. If the judges have made new law, they have not made new rule. Similarly, statute or charter, in conferring upon a social group the legal status of a corporation, is not creating something new; it is simply setting an official seal upon a pre-existing reality.

The unincorporate group.

512. Those to whom the past history of corporations in English law is inconclusive, will do well to reflect upon the enormous range and variety of those unincorporated institutions which exist to-day, and of which many already present the more important characteristics of personality without having been officially and openly recognized as legal persons. When such an unincorporate group chooses to incorporate, the change, as Professor Maitland has well said, may amount to no more than a mere event in its history. "We could not even compare it to the attainment of full age. Rather it is as if a 'natural person' bought a typewriting machine or took lessons in stenography."

Corporation v. fictitious person.

513. The untenability of the view that corporate personality is a mere legal fiction is most clearly seen when we compare corporate personalities with personalities which are really fictitious. Austin classifies "fictitious or legal persons" under three heads:—

1. Collections of physical persons, e.g. corporations aggregate.
2. Things, e.g. the *praedium dominans*.
3. Collections of rights and duties, e.g. the *haereditas jacens*.<sup>1</sup>

No argument can be necessary to prove that in the second and third of these cases the attribution of personality is a mere legal fiction designed to facilitate certain practical objects. If the jurist visualizes the *haereditas jacens* as a person, it is merely because he finds it convenient to do so,

<sup>1</sup> "Jurisprudence," 5th ed., I, 354.

and not because of any realities in the *haereditas iucens* itself which bear a close analogy to natural personality. Unities of spirit and purpose, will and action, are wholly lacking. To talk of them is absurd.

514. To the discerning, then, it would seem that the view of corporate personality as a mere fiction is but a stage in the evolution of legal ideas. When, at a certain stage in national development, lawyers find themselves brought face to face with the fact of corporate personality, they find a difficulty in knowing what to do with it. Existing legal categories find no place for it. No material reality, nothing apparent to the senses, is at hand. A crude realism denies that there can be any person except the corporators. (Yet) realities press with increasing urgency for legal recognition. It is seen to be necessary to recognize in the group a capacity for legal rights and duties—the test of personality. To call the group a person is then the first stage—person not by reality, but by fiction of the law. There is nothing beyond the corporators, it is said, but let us *suppose* a person for convenience's sake. As groups multiply and ideas develop, this provisional solution of law is seen to owe more to realities and less to the juristic imagination than was at first supposed. The corporate person is stated to be a *real person*. The statement is true, though, as I shall proceed to show, it is liable to be misunderstood.

515. The outcome of the preceding argument may be briefly expressed by saying that the corporation is a person, and that this person is not a legal fiction. That it must be in consequence a real person, seems to follow necessarily. Yet we must be careful to remember that, in such a connection, the term "real" person is not the same as physical person. Personality is a legal conception. A natural person is a legal conception, a physical reality, and a natural organism. A corporation is a legal conception, but neither

a physical reality nor a natural organism. When we say that a corporation is a person, we imply that it is a legal conception. When we say that this corporate person is not a legal fiction, we imply that it is a representation of psychical realities which the law recognizes rather than creates. The whole conception of group personality belongs to the world, not of material, but of psychical realities.] The differences between corporations and physical persons are so numerous and significant that it is important in the interests of clear thinking not to lose sight of them—a thing we are very apt to do if we press certain highly practical and profoundly suggestive analogies beyond legitimate limits. When a corporate person comes to will and to act, it is confronted by peculiar difficulties. The ordinary principle of willing by a majority is a triumph of conscious art. “The canon lawyers,” it has been said, “escaped the fallacy that some natural law enables a majority of members in a duly convened meeting to express the will of the corporation.”<sup>1</sup> The law assumes, it is sometimes urged, that the will of a majority represents what would be the unanimous will of the corporation if unanimity were insisted upon. It need hardly be said that this is pure assumption, justified by expediency and not by *a priori* necessity. Again, natural persons act without the mediation of another person. The corporate person can only act through the mediation of natural persons. The real significance of this difference is seen when we try to find a name for the natural persons who act for the group. Shall we call them agents? representatives? or organs? To call them agents is clearly open to objection, since an agent is appointed by a principal who himself wills and acts. To choose between representative and organ is more difficult.

<sup>1</sup> Pollock and Maitland, “History of English Law,” I, 491.

The term representative suggests a distinct person whose will and act are accepted as the will and act of another person. A more intimate term is needed to describe the persons whose acts are attributed to the corporation. They are members of the corporation, and their will has more claim to incarnate the corporate will than the will of the guardian, for example, to incarnate the will of the ward. That this is true is exemplified by common speech, which identifies the will of the natural persons acting for the group with the group itself, while refraining from speaking of the will of the guardian as the will of the ward. We say the community sold; we do not say as much of the idiot, argues Le Mestree.<sup>1</sup> On the whole, the term organ seems more apt to suggest the true inwardness of things than any other that can be suggested. Nevertheless, it is clear that between the organ of the group and the organ of the individual there are important differences. The one has an independent existence, the other has not; the one is a person, the other is not; the one is variable, the other is necessary and unchangeable. The natural person who follows a scriptural injunction as to offending members may find himself eternally hereft; the group person is more fortunate. The dangers of a too literal interpretation of the word organ are well illustrated by the anthropomorphism of an early time in accordance with which it was held that a corporation could not survive the loss of its head. So wrote King James of the body politic. "And for the similitude of the head and the body, it may well fall out that the head will be forced to garre cut off some rotten member to keep the rest of the body in integritie; but what state can the body be in if the head for any infirmitie that can fall to it be cut off, I leave it to the reader's judgment."<sup>2</sup>

<sup>1</sup> "Les Personnes morales," 212.

<sup>2</sup> King James, "Works," ed. 1616.



The State. 516. If we now return to the problem with which we started, how to formulate a legal theory of the State, we have at our command a conception of group life which should prove of the utmost service—the conception of a corporate personality. I have endeavoured to prove, at a perhaps wearisome length, that this conception is no mere fiction of the law. My reason will be now apparent. If corporate personality were mere fiction, the propriety of considering the State as a person would have to be determined by reference to purely formal considerations. But if, as I have endeavoured to prove, the corporate personality is no mere creation of the lawyer's imagination, but a generalization based on certain unities of spirit, purposes, interests, and organization which exist in every social group, we can no longer deny the necessity for recognizing the personality of that highest and most developed social group, the State. Patrimonial theories of government, and doctrines of an absolute sovereignty of visible rulers, may blind us to this necessity. Its ultimate recognition is inevitable.

Legal conservatism with respect to the State. 517. In these respects, as in many others, the theory of the law has lagged behind the thought of the nation. While lawyers have admitted the existence of "personality which is a fiction" in the corporation, other people are loudly affirming the existence of "a personality which is no fiction" in the State. The historian who sees in the State a growth, the scientist or sociologist who holds it a moral organism, the political philosopher who talks of social solidarity, the social consciousness, conscience, will, and intellect—all alike bear testimony to the power and growth of a conception which has enriched the political thought of our time. Even that much-abused individual, the man in the street, is beginning to feel that the State into which he is born and in which he lives and dies, which comes out of the past and passes on to an indefinite future, may have many "personal" qualities

and an existence from many points of view superior to his own. Meanwhile, however, from the point of view of English law, if we are to believe what we are told, the State is no person, ideal or fictitious. In Great Britain, it is not the State, but the Crown, which owns property, is responsible for debts, enjoys rights and privileges, and administers justice. Truly the ways of transgressors are hard. Prohibited from admitting the personality of the State, either by the poverty of our ideas or by the conservatism of our temperament, we are driven to the device of attributing privileges and responsibilities to the king which no one can suppose to be really his. A sounder legal theory, however, knocks loudly at our door, and some day we shall awake to find we have been talking in our sleep. When that day has come, some legal fictions which are real fictions will make way for a legal theory which is a true theory—a theory, I may add, which is already implicit in many legal rules.<sup>1</sup>

518. If it be the mission of legal science to look behind the professions of the lawyer, to harmonize those professions with one another and with the facts of national life, we must conclude that the jurist has a serious responsibility to undertake in the direction of giving some rational account of the State. He must take the legal conception of corporate personality, interpret that conception in the way most consistent with the facts of social life, and must here bring his deeper interpretation to bear on the problem of the nature of the State itself. In the process he will discover that the analogies between the State and the corporation are incomparably more important than the differences. ,

519. The most conspicuous differences between the State and the corporation deserve consideration if only to convince

The problem of jurisprudence.

State v. Corporation.

<sup>1</sup> On the nature of the Crown as a Corporation, *vide* two articles in the "Law Quarterly Review," the first by Professor Maitland, vol. XVII, 131, the second by Professor Harrison Moore, vol. XX, 351.

us of the superior claims of the State's personality to recognition. In the first place, the State's will is sovereign, and therefore subject to no regulation from above; its powers over members are numerous, indefinite, and irresistible; and its purposes, general rather than special, touch human life at every point. In the second place, it has far more claims to be considered a natural growth than most corporations. Conscious art has far less to do in its origin. It is born before the individuals whose lives go to form it are quite aware of what they are doing. With self-consciousness comes a demand for philosophical justification of the state-building process, but that process has been going on in obedience to elemental instinct. "Law and institutions are only possible," writes Professor Bosanquet, "because man is already what they gradually make more and more explicit."<sup>1</sup> Hence, in the third place, the personality of the State is more highly developed than that of other collective persons. The shareholder in a joint-stock company is united to other shareholders by unities in every way inferior in degree and intensity to those which bind together the citizens of a state. Both company and State are organized groups, but in the mind of the component individuals which go to form them, the social self in one case is strictly limited, whilst in the other case it is unlimited, extending in its range over the whole compass of individuality.

Some practical advantages of conception of State personality.

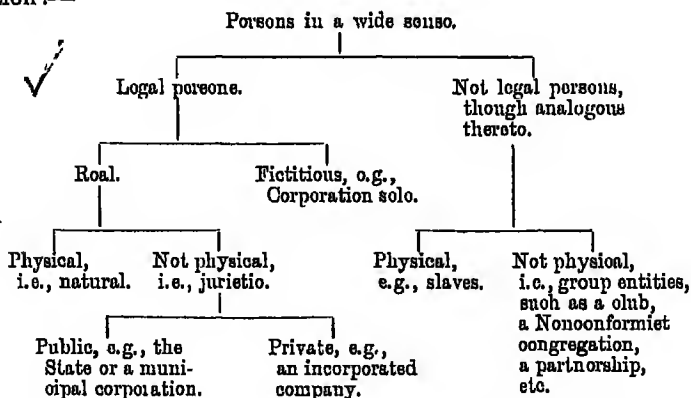
520. While the consideration of the differences between the State and the corporation only serves to intensify the conviction of the reality of the State's personality, when once this personality is definitely recognized, the student has at his disposal a view of the State which has the merit of representing realities and incidentally of solving some of the most difficult problems of Public Law. In particular, the representation of the action of the State through its

government, as the action of a person through definite organs, commands respect as a representation which is both convenient and true. The value of the conception of State personality in regard to questions of sovereignty will receive some illustrations in the following Excursus.

521. If, then, the State be a person, and if that person has very special claims to legal recognition, to what position should we assign it in a complete scheme of legal persons? To answer this question, we must begin at the beginning and consider how law at present classifies persons. In the first place, we must exclude from the list of persons recognized as such by law, certain entities which hover on the borders of recognition as persons without securing such recognition. The class includes slaves, children *en ventre sa mère*, and group personalities of which the law takes no direct cognizance. As we have seen, no degree of psychological unity will serve to make a group for legal purposes a person: a family may be a psychological unity; it is not as such a person: a large number of natural persons may pledge themselves, soul and body, to secure a political reform; they do not as such become legal persons. In the second place, among legal persons we must distinguish those which are real from those which are fictitious. Instances of the last-mentioned abounded in later Roman Law. A person who dedicated property for certain purposes, whether by will or by gift *inter vivos*, thereby created a new subject of rights and duties—it may be a hospital, poor-house, convent or church. In English Law we have an instance in the corporation sole. We attribute personality to the succession of the holders of a certain office. There can be no pretence to psychological unity in such cases. The attribution of personality may be serviceable, but is fictitious. In the third place, among legal persons which are real persons, we have to distinguish between those which consist of an

The position of State in a scheme of legal persons.

individual and those which consist of a group of individuals. The former are generally called natural persons. The group of individuals is often called a moral person, but this term cannot be used with propriety by the jurist for the reason that it has been already appropriated by the philosopher. Just as the natural person of the lawyer has to be distinguished from the physical person of the vernacular, so the group person of the lawyer must be distinguished from that much wider class, the moral person of the philosopher. A more common designation of the group person is "juristic," though this latter term is open to the objection that the natural person is a juristic conception and therefore a juristic person. The term, however, is very generally adopted in practice and may be accepted on this ground. Finally, juristic persons have to be divided into two classes according as the person is, or is not, a public body. The State finds its true place in the complete scheme as a concrete example of the last-mentioned class. Combining the various principles, we arrive at the following classification:—



Such a classification may leave much to be desired from the point of view of logic, but it is perhaps as logical as the present condition of the law will admit.

## EXCURSUS B

### SOVEREIGNTY

525. The student who invades that dread domain, the Contro-  
literature of the doctrine of sovereignty, finds himself in a <sup>versal</sup> world where differences of opinion are numerous and funda-<sup>character</sup>  
mental. One moment he learns that sovereignty is neces-<sup>of the</sup>  
sarily absolute, the next that it is eternally limited. Now subject.  
he is told that in the nature of things sovereignty must be  
indivisible and inalienable; now he is confronted with  
definite illustrations of sovereignties which have been divided  
or abdicated. If he seeks to inquire what sovereignty is  
based on, he is told by some that it is based on force, by  
others on will, by others on reason. If he be so rash as to  
ask where sovereignty resides, he is referred to persons or  
bodies of all kinds—to a visible ruler, to governments, to  
constitution-revising assemblies, to an electorate, to the  
popular majority, or to the body politic.

526. He who knowingly and voluntarily enters upon a Suggested  
region of such bewildering contradictions, may be presumed <sup>explanation</sup>  
to be possessed of the doubtful blessings of an independent <sup>of the</sup>  
mind and a will to fight his way to conclusions which shall fact.  
be his own. He need also have a courage and a modesty  
not less rare, a courage to brave difficulties which have over-  
come many a hardy adventurer who has gone before him; a  
modesty to profit by the lessons which the failures of others  
may afford him. If he can but discover some intelligible  
explanation of the extraordinary divergences of opinion to  
which reference has been made, the explanation may enable

him to avoid at least some of the dangers that have been fatal to others. Three facts may be mentioned as a contribution towards such an explanation.

(1) Sovereignty worth fighting about.

527. In the first place, as man is constituted, sovereignty is something well worth fighting about. It belongs, if not to the things which men hold sacred, at least to the things which men hold dear. *Power and authority over others!* In the great controversies which have raged from time to time round the subject, the student will find everywhere reflected the despotism of the emotions over the intellect. Theories of sovereignty have been more often apologies for a cause than the expression of a disinterested love for truth. Bodin, father of the modern doctrine, was supremely a defender of the centralized monarchy which was to supersede a decadent feudalism, and win for France the first place among the nations of the earth. Hobbes, if not the apologist of tyranny, was at least the defender of absolutism. Endowed with a nature which combined moral courage with physical cowardice, he was audacious in abstract speculation whilst actually engaged in building a political fabric wherein the individual might find a substitute for the infallibility of the Pope in the infallibility of the monarch. Rousseau, propounder of a political theory which, in spite of defects and inconsistencies, revealed the subtlety of a philosopher and the fire of a prophet, was a passionate devotee of the Rights of Man. When the gospel which he proclaimed was adopted as the vindication of the Revolution, when the Reign of Terror succeeded to the despotism of princes, the way was prepared for a host of reactionary theorists supremely concerned to defend the cause of social order against an imminent social anarchy. So, historically-minded jurists like Burke and Savigny, repelled by the excessive emphasis which the school of Rousseau had laid upon the conscious element in human development, proclaimed a doctrine of society as an

unconscious growth; philosophical jurists like Kant, alarmed lest the risings of the peoples should mean the recrudescence of barbarism, preached a doctrine which denied the right of popular resistance and affirmed the doctrine of governmental absolutism in terms which often exceeded the professions of the illustrious Bodin; and religious writers like De Maistre, shocked by the apparent irreligion of the Revolutionaries, preached a doctrine of monarchical legitimacy which was scarcely distinguishable from the despised and rejected theory of the divine rights of kings. Still later in the nineteenth century, in that great Republic of the New World which was officially pledged to the theory of the Revolution and the Rights of Man, the doctrine of sovereignty became the debating ground of acute and subtle thinkers who sought to defend, or to deny, the rights of particular States in the Union. That controversy, as we all know, was settled by an appeal to the sword—an appeal which might have grand political results, but was unlikely to contribute to the scientific elucidation of juristic or political theory.

528. In the second place, sovereignty, being an attribute of human association, must be subject like human association to the laws of development. Generically describable as some kind of power or authority in some kind of political community, sovereignty must necessarily change as communities grow. Any account of it which affects to be universal is almost certain to be misleading. Failure to recognize this simple fact, attempts to find universal theories when provisional theories alone can be at once possible and useful, have resulted in a fatal divorce between doctrine and reality.

529. In the third place, and the fact will be evident from what has preceded, sovereignty is not a conception of which the meaning is wholly confined to one department of human

(2) Sovereignty a development.

(3) Sovereignty a conception of several



social  
sciences.

thought. It disturbs the serenity of the courts of justice; it enters the arena of legislative debate; it is a matter of international diplomacy which at any moment may bring the armies of the nations into savage conflict. One consequence is clear. The lawyer, the political philosopher, the international jurist—each of these must necessarily regard the fact of supremacy in a State from his own point of view. A doctrine of that supremacy which will serve for the one, will be misleading or inadequate for the others. Failure to recognize this simple truth has added enormously to the perplexities of the highly controversial literature of the subject. The lawyer appeals to the dicta of the statesman or the diplomatist, in order to defend a position which may be valid within the sphere of Politics or International Law, and yet be wholly inadmissible for the purposes of the settlement of judicial conflicts. On the other hand, revolutionists, while going beyond the law, have often striven to prove that they were keeping within it, and have affirmed a legal right of resistance where none but a moral right could be pretended.

The Moral. 530. The extraordinary dissidence of opinion, which might drive a student to the extremities of cynicism or despair, assumes a less terrible aspect when we remember that it can be largely explained by other considerations than the intrinsic difficulty of the subject. The labours of the student of Jurisprudence will be much lighter, and incomparably more fruitful, if he will bear in mind that his purpose is scientific not polemic, that his field of investigation is the highly developed community not universal history, and that his point of view is that of the lawyer as distinct from that of the statesman, the diplomatist, or the political philosopher. He must not be surprised, however, if he finds it not always easy to observe the last of the limitations suggested. If, disdaining to regard as holy writ the consecrated formulæ which the lawyer employs to conceal his thought, he looks

beyond such formulæ to realities, he is brought at times into very close relations with the social sciences generally. Partly for this reason, and partly in order to illustrate the general position that the points of view must be carefully distinguished, I shall preface the discussion of the subject of sovereignty in Jurisprudence by a brief consideration of the allied subjects of sovereignty in International Law and in Political Science.

### I. SOVEREIGNTY IN INTERNATIONAL LAW

531. Discussions on the nature of sovereignty have occupied a prominent place in the literature of International Law. Such discussions approach the subject from a point of view which is distinguishable from that adopted by writers on Jurisprudence, even when the Jurisprudence is based on the comparative study of different legal systems. The student of International Law, like the student of Comparative Law, is concerned with existing forms and institutions rather than with the actualities of a remote past or the unrealized ideals of some philosophic system. Both are legalists who seek a doctrine of sovereignty which will apply over a wide area. But at this point important differences become apparent. The student of Comparative Law is more especially concerned with the better understanding of the Constitution of his own country. He may take a wide view of political societies, but he is eclectic in his study of them. If he finds that his doctrine of sovereignty does not square with facts as they appear in communities less developed than his own, he does not necessarily modify that doctrine. The student of International Law, on the other hand, must find some place for such communities in his scheme. Again, the student of Comparative Law is primarily interested in the internal aspect of sovereignty; the student of International Law in the external aspect. One thinks of sovereignty as supremacy

Sovereignty in International and Comparative Law.

over the subjects; the other as a relation of State to State. As a consequence, the student of International Law is intimately concerned with topics which are only incidentally discussed by the Comparative lawyer—e.g., the extent to which the independence of a sovereign may be affected by treaty obligations. Finally, the student of International Law, perplexed by the variety of the material with which he has to deal, is compelled to rest content with a conception of sovereignty as divisible into many parts, of which hardly any one is essential.<sup>1</sup>

## II. SOVEREIGNTY IN POLITICAL SCIENCE

Legal v.  
Political  
sover-  
eignty.

532. In the notes to the text of Austin, I have referred on several occasions to the distinction between legal and political sovereignty. The distinction is of great importance even in the elementary form in which it is generally presented. The lawyer is interested in the State in so far as the State takes form in definite organizations recognized by the law. The political philosopher, desirous of penetrating more deeply into the nature of things, looks behind such organizations to the powers or forces which find expression in them. Both think of sovereignty as supremacy, but one regards that supremacy as an attribute of some organization known to the law; the other regards that supremacy as a reality in the world of practical forces.

Political  
sover-  
eignty in  
Great  
Britain.

533. Political sovereignty is practical supremacy; but where in a modern state like our own is this supremacy to be found? If we are disposed towards the legal view of things, we may say that in Great Britain the House of Commons is the political sovereign; or, if we are somewhat less legally minded, we may say that the real supremacy does not rest with the House of Commons, but with the electors

<sup>1</sup> Cf. *supra*, sec. 296 n.

of the United Kingdom ; or again, shaking off the fetters of legalism altogether, we may say that the whole community is sovereign, meaning by the community either a sum of individuals or an organic unity. Thus, without going beyond the British Constitution, we find at least four distinct types of the conception of sovereignty for the purposes of political science. These types may be expressed briefly as follows :—

- (1) The dominating power in the government.
- (2) The electoral body.
- (3) The popular majority.
- (4) The State as a moral organism.

If we were to extend our analysis to other States, some of the above expressions must be made more general ; some new types must be added. For present purposes, the list may be accepted as it stands. Each of the types to which reference is made has some claim to answer to the description of the political sovereign which has been suggested by Professor Dicey. "That body is politically sovereign the will of which is ultimately obeyed by the citizens of the State."<sup>1</sup>

534. The choice between the four types mentioned must depend upon conditions of time and circumstance. The theory of sovereignty must keep pace with the progress of society. The progress of society may assume at least three distinct phases—territorial expansion, the extension of political power to new classes of the community, and the increase in the strength of the various bonds, material, intellectual and moral, which unite the citizens to one another and to the State. The end of the first phase is the large political aggregate ; the end of the second, the democratic community ; the end of the third, the realization of a national life. As progress in one or other of these phases absorbs the energies

<sup>1</sup> "Law of the Constitution," 5th ed., p. 69.

of the State, the seat of sovereignty is changed. Conspicuously, progress in the form of territorial expansion is apt to involve some sacrifice of the results of progress in the form of advance towards organic unity; as the social group merges in the larger group, the moral bonds which have held men together as members of the smaller group may lose much of their force without being immediately succeeded by moral bonds of equal strength between citizens as members of the larger group. In other words, the process of drilling men into larger communities is one in which force is apt to play the prominent part. When it does so, political sovereignty shifts from communities to a superior power: it ceases to be democratic and becomes monarchic or aristocratic.

Illustration in medieval history.

535. English medieval history affords a partial but instructive illustration. The town of medieval England, in the course of its long struggle against the forces of feudalism, realized a high degree of organic unity. Throughout a long period, the practical forces which compelled the subject's obedience embraced both the King, by whose aid the borough community succeeded in attaining a relative independence, and the borough community itself. When, on the other hand, the strongly centralized State succeeded in establishing itself, the need for self-assertion on the part of the borough community grew less, and the spirit and authority of the town life declined. The political centre of gravity shifted in the direction of the Monarch; and a point was reached at which it might have been said with a fair approach to accuracy that the King alone was political sovereign.

And in modern history.

536. If we turn from medieval to modern history, we find each of the three phases of political progress in full operation. Britain has become the United Kingdom: the franchise has been successively extended to new classes of

the community; and, despite the loosening of many of the older social bonds, an advance has been made towards the realization of a highly organic national life. Each of these developments must be taken into consideration if we are to determine where political sovereignty resides. That we cannot stop short of the electorate will be apparent. Whether, having gone so far, we ought not to take a further step and regard the State itself as politically sovereign is a more debatable question which may be answered differently by different inquirers according to their estimate of the degree of progress which has been made in the different forms already suggested. Also, it may be added, according to the particular object in view. Professor Dicey, whose definition of political sovereignty has been already mentioned, rests content with the electorate. But his avowed object is simply to distinguish political from legal sovereignty. For the purposes of political science, I believe we need to carry our analysis further.

537. A suggestive contribution towards the solution of the The problem under discussion has been made by T. H. Green, in his work on "The Principles of Political Obligation." The analysis of T. H. Green. The essential characteristic of society, according to Green, is a power which guarantees men's rights. This power, he urges, does not necessarily reside in the supreme coercive power known to law—a statement illustrated by the case of States under a foreign dominion which retain a national life of their own; and again, by Oriental despotisms where the nominal sovereign is a mere tax-gatherer who leaves the maintenance of right within the particular communities to local law and custom. At this stage, however, if we are to make use of Green's analysis for the purposes of developing a doctrine of political sovereignty, we must be guided by the spirit rather than the letter of his language. In a State like Great Britain, he admits the sovereignty of the government because

the government may claim to express the general will. But the circumstance that a government may claim to represent the general will does not make that government the political sovereign. As Green expressly states, the habitual obedience of the subject in Great Britain is really determined, not by the ruling power, but by the common will and reason of men—a will of which the ruling power is the agent even though some of its laws may be in conflict with that will.<sup>1</sup> Both political subjection and morality, he contends, have a common source in the rational recognition by human beings of a common well-being which is their well-being, and which they conceive as their well-being, whether at any moment any one of them is inclined to it or not, and in the embodiment of that recognition in rules which restrain individual inclination and secure a corresponding freedom of action for the attainment of general well-being. Though the idea of the State as serving a common interest is only partially realized among men, nevertheless, every citizen who is not a member of the dangerous classes, has a clear understanding of certain interests and rights which are common to himself with his neighbours. Habitually and instinctively he regards the claim which he makes for himself as conditional upon his recognizing a like claim in others. With such a regard, though he has no regard for the State under that name, he has still the needful elementary conception of a common good maintained by law. "We only count Russia a state by a sort of courtesy on the supposition that the power of the Czar, though subject to no constitutional control, is so far exercised in accordance with a recognized tradition of what the public good requires as to be on the whole a sustainer of rights."<sup>2</sup> The general conclusion may be inferred that, according to Green, a State worthy of the name is a moral

<sup>1</sup> "Principles of Political Obligation," §§ 90-4, 132-4.

<sup>2</sup> *Ibid.*, §§ 100-32.

organism; practical supremacy within it can only be attributed to the general will.

538. Before passing from the subject of political sovereignty, I may refer to the analysis of Austin. That analysis, as we have seen, confuses political with legal sovereignty. But of whichever of these he is thinking, he invariably looks upon the sovereign as a superior person or body who imposes his will on inferiors. He is accordingly classed by most writers among those who base sovereignty on force. This traditional view of the Austinian analysis has been attacked by Professor Dewey, who alleges that the distinction between the Austinian theory and that implicitly adopted by T. H. Green is a distinction, not between force and general will, but between will as inhering in a *part* of society and will as existing in society as a *whole*.<sup>1</sup> I regret not to be able to agree with this acute critic. Austin's references to the utilitarian ends of government, and to the popular appreciation of those ends, are merely incidental. They do not enter into, and determine the nature of, his general theory of sovereignty. That theory, for all practical purposes, accepts the objective fact of a sovereign will imposing itself upon inferiors as an ultimate fact behind which it is unnecessary to go. This detachment on Austin's part appears to me to justify the traditional presentation of his theory as based on force.

### III. SOVEREIGNTY IN JURISPRUDENCE

539. Sovereignty for the purposes of Jurisprudence, sovereignty without qualifying epithet, may be defined as supremacy recognized by law. But the location of this supremacy, like the location of political sovereignty, has varied from time to time. In the early days of the develop-

<sup>1</sup> "Austin's Theory of Sovereignty": "Political Science Quarterly," IX, 1. 37.



ment of the modern doctrine, no practical need existed for distinguishing between the governments and the legally supreme or unlimited authority. When, however, the Puritan Reformers of the Commonwealth were devising new constitutions, they decided to impose very important limitations upon their governmental assemblies. The *Agreement of the People*, after prescribing the Parliamentary Constitution, proceeds: "The power of this, and all future representatives of this Nation, is inferior only to theirs who chuse them, and doth extend . . . to whatsoever is not expressly or impliedly reserved by the represented themselves.

Which are as followeth,

1. That matters of Religion, and the wayes of God's worship, are not at all intrusted by us to any humane power," etc., etc. We have here in germ that distinction between ordinary government and extraordinary government which has since become the basis of most modern constitutions. The distinction involves a practical difficulty with regard to the location of sovereignty. When government and legal absolutism are separated, what becomes of sovereignty? Some writers have sought to surmount the difficulty by locating sovereignty in both ordinary governments and the extraordinary governments or constituent assemblies, regarded as forming parts of an ideal whole. The solution is not always satisfactory, since the constituent assemblies may be absolutely superior to the ordinary governments, and entitled to amend them at will. Where this is the case, it must be admitted that sovereignty and government are definitely separated unless we are to throw over the conception of sovereignty as legal supremacy.

Sovereignty  
under *The  
Agreement*

540. But at this stage a further difficulty arises. To what power ought formal supremacy to be attributed in the case of a State with a written and rigid constitution containing no

provision for its amendment? The scheme of organization of the prescribed by the *Agreement of the People* is a concrete <sup>People.</sup> example. In a note to the text of Austin, I remarked that the question *might* be resolved by assuming that a power to amend the constitution had been vested in the highest law-making body known to law. The answer surmounts the difficulty by help of a legal fiction. The more logical solution would be to attribute the sovereignty to the State itself. Such a sovereignty, though it cannot be immediately actualized in a way recognized by law, may still serve two important purposes. It may provide legal theory with a supreme source from which all law and all governmental institutions shall derive their authority; and it may be employed in some revolutionary crisis to give a legal form to the will of a revolutionary legislative assembly.

541. The *possibility* of the location of the sovereignty in the State-State itself is implicitly recognized in all modern theories <sup>sover-</sup> which state legal limitations upon the power which ranks <sup>ignty v.</sup> highest in the hierarchy of State institutions. The sovereign <sup>Ruler-</sup> is the source of all law, and so cannot be limited by law; <sup>sover-</sup> where a legal limitation is held to exist upon a power claim-<sup>ignty.</sup> ing to be sovereign, we are compelled to infer that legal theory looks beyond the pretended sovereign to the State itself as true sovereign and ultimate source of law. Such an inference is a far cry from doctrines of Ruler-sovereignty, but may be founded on very practical considerations. Whilst there are obvious objections to a State being so organized as to make some things only possible by revolutionary process, a State may desire that it *should* be so organized. The desire, like other facts of the national life, may find expression in legal theory. If a power which is highest in the hierarchy of State institutions passes a law, although that law is expressly a rule and implicitly a declaration that its passing is within the competence of the power which passes it, the tribunals

are not bound to apply the law if they feel impelled to regard it as exceeding limitations imposed upon the rulers by the will of the State. Austin would probably say that sovereignty in such a case exists in a combination of the Legislature and the Judicature. The contention might be urged with apparent justice where the Courts are capable of being regarded as depositaries of a sort of tribuniciary veto. Where, however, the Courts simply rely upon limitations expressly stated in a written constitution, the view ceases to be maintainable.

Suggested  
goal of  
legal  
theory.

542. The fact that under conceivable conditions sovereignty in a state may not admit of being actualized in the law-making institutions, ordinary or even extraordinary, has a profound significance for the student of Jurisprudence. I have dwelt upon it at some length for a reason which I shall now proceed to state. When once the conclusion has been reached that under conceivable conditions sovereignty may reside in the State itself, the more startling conclusion is suggested that sooner or later the location of sovereignty in the State must be accepted as an axiom by legal theory in all highly developed communities. Even where legal absolutism can be attributed to some definite legislative institution, sooner or later the question is certain to arise whether, after all, formal supremacy can be attributed to that institution save as an organ of the State. In a multitude of ways the State, as owner of its territory, as invested with property and the dubious blessing of a National Debt, demands legal recognition. But if once the law recognizes the State as an entity capable of rights and duties, it is almost compelled to attribute sovereignty to that entity, and to regard the supreme law-making institution as merely an actualization of a formal supremacy which in the last analysis can only be found in the State itself.

Confirm-  
ation from

543. The conclusion just suggested has been reached by reference to formal considerations. But a similar conclusion

is also suggested by considerations which go to the roots of <sup>facts of</sup> things. As in the sphere of politics, in proportion as nations <sup>social life.</sup> have come to self-consciousness, political sovereignty or practical supremacy is seen to reside in the community regarded as an organic totality, so also in the sphere of Jurisprudence, those who seek to think things together, to bring legal formulæ into some relation with the actual tendencies of social life, are impelled to look beyond the sovereignty of Court etiquette, and beyond the sovereignty of parliamentary institutions and constitution-revising assemblies, to the totality of the community which King, Parliament or Assembly but represent. But while in politics men have sought to give expression to thoughts and ideas that were clamouring for recognition in some theory of Society as a moral organism, the tendency in Jurisprudence has been rather to make use of a conception which existed in germ in Roman law and was suggested by the attempts of lawyers to find some expression for the phenomena of group life as exhibited in the *universitas personarum*—the conception of a juristic person. The recognition and development of this conception represent the most important contribution to Jurisprudence which has been made in recent times.

544. The general conclusions of the present Excursus may <sup>Summary.</sup> be briefly summarized. Sovereignty is a conception whose meaning and incidents must vary with the particular department of thought with which the student is more immediately concerned. In Political Science, it may refer to the *practical* supremacy of

- (1) A government;
- (2) An electoral body;
- (3) A popular majority;
- (4) The State as a moral organism.

In Jurisprudence, the conception may refer to the *formal* supremacy of

- (1) A government ;
- (2) The highest law-making body ordinary or extraordinary ;
- (3) The State as a juristic person.

545. Such a list can make no pretence to completeness, but will serve for the purposes of a practical discussion. The choice between the various types of theory thus grouped must vary according to conditions of time and circumstance. So far as the Jurisprudence of our time is concerned, the sovereign may be defined as the power whose authority is regarded by law as unlimited, and as the source both of all law, and of the authority of all law-making or governmental institutions. Although the location of the sovereign varies in the different legal theories of different nationalities, it seems probable that the Jurisprudence of a near future will recognize that the State itself is the true sovereign, and that such a body as the Parliament of Great Britain should be described, not as the sovereign, but as the sovereign-organ. "Let us see, then," wrote Grotius, "in what subject sovereign power resides. The subject in which a power resides is either common or special ; as the common subject in which the sight resides is the body, but the special subject is the eye. And in like manner the common subject in which the sovereignty resides is the State. . . . The special subject is one or more persons according to the laws and customs of each nation."<sup>1</sup> The conception of legal sovereignty as inhering in a portion of the community needs then to be revised by reference to the fact that such portion is but an organ of the community as a whole. When we have escaped from the tyranny of mere forms, and have overcome the superstition that we must not regard things in their totality, when we have learnt that, on the contrary, it is only

<sup>1</sup> Grotius, *De Jure Belli ac Pacis*, Whewell's translation, vol. I, p. 113.

when we so regard them we can hope to comprehend them, we shall find some place in legal theory for ideas which have already profoundly affected less conservative branches of learning. We shall not fear to think of the State as a unity, a personality, a sovereign—a sovereign in whose presence the visible ruler can aspire to no higher title than that of sovereign-organ. The law may accept the declared will of that visible ruler as conclusive of the will of the sovereign, but the fact need not prevent us from recognizing, even as lawyers, that the visible ruler is but an organ of the organized community. It has been said of a great scientist that he closed the door of his laboratory before he entered the door of his church. The attitude is suggestive of the provisional order of things, since a theological theory which will not somehow square with the laboratory can afford no resting-place. Similarly a lawyer who leaves what he has learnt from history and science behind him when he opens his *Law Reports* is merely postponing a difficulty. That difficulty will have to be met somehow. When it has been met, legal theory will not be the less, but the more, worthy of his homage.

## EXCURSUS C

### THE ENGLISH JUDGE AS LAW-MAKER

Purpose of 552. IN the present Excursus I propose to discuss the  
Excursus. questions whether, and if so, within what limits and by  
what authority, judges may add to the existing law by the  
indirect process of judicial decision.

I. View 553. To the question whether judges may add to the  
that existing law by their decisions, it might seem a sufficient  
judges do answer to say that a great part of our law has been  
not make developed in this way. Yet an ancient fiction to the  
new law. contrary has displayed a quite extraordinary virility, and  
must be run to earth if we are ever to have a sound theory  
of the judicial office. At times the fiction is openly avowed  
as essential truth. It was expressed forcibly and with  
approval in a comparatively recent address delivered before  
the American Bar Association by a distinguished American  
lawyer.<sup>1</sup> The precise words merit quotation. "All the  
knowledge which we really have of the law comes from the  
judge. But how does he get at the law? Does he *make*  
it? . . . Let us examine the process. The statute book is  
first consulted, and if that speaks to the point and clearly,  
all doubt vanishes. But in the great majority of cases the  
statute book is silent, and what is the resort? Inquiry  
is made by the judge concerning what his predecessors have  
done, and if he finds that a similar state of facts has been  
considered by them and the law pronounced in reference

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<sup>1</sup> J. C. Carter, "The Ideal and the Actual in Law," *American Law Review*, 24, pp. 758-9.

to it, he declares the same rule law. But in many, indeed most, of the controversies brought before him, no record is found of a precisely similar case, and the law is to be declared for the first time. Here is the interesting and crucial test of the question how the law springs into existence. That the judge cannot *make* the law is accepted from the start. That there is already existing a rule by which the case must be determined is not doubted. Unquestionably the functions of making and declaring the law are here brought into close proximity; but, nevertheless, the distinction is not for a moment lost sight of. It is agreed that the true rule must be somehow *found*. Judge and advocates—together—engage in the *search*. Cases more or less nearly approaching the one in controversy are adduced. Analogies are referred to. Customs and habits of men are appealed to. Principles already settled as fundamental are invoked and run out to their consequences; and finally a rule is deduced which is declared to be the one which the existing law requires to be applied to the case."

554. To discuss all of the fallacies in which this statement abounds would be superfluous. Two, however, are peculiarly deserving of attention. In the first place, the statement involves a confusion which has been exposed time after time, between the material and the formal sources of laws, between the sources from which laws have taken their origin as rules and the sources from which laws have taken their title to rank as rules which the State will enforce. Let us suppose for a moment that a judge always *finds* a rule, in preference to *making* one. Wherever he has found it, his decision becomes a precedent for future cases. The *rule* may not be new or judge-made; often the *law* is both. If the British Fleet discovers and annexes an island, the *British possession* is new-made, though the *island* be as ancient as the Universe.

Criticism:  
(1) Confusion of formal and material sources of legal rule.



(2) Implies  
an infinite  
code.

555. Apart from the confusion of the formal and material sources of law, the argument of Mr. Carter implies that the rules of law are of infinite range. If the judge does not make the law, but only declares it, it must have existed before. The practical result follows that the law of our time, though in great part unrevealed, provides for every case that can possibly arise. The view may be logically defensible where judges claim to be the oracles of a divine omniscience. To us who have the disadvantage of living in a more sceptical age, it must seem the beginning of wisdom to recognize, frankly and unreservedly, that law never has been, and never will be, adequate to existing need. This must be so under the completest code that man could devise. The wisest legislator cannot foretell the future, or entirely comprehend the present. "The narrow compass of human wisdom," declared Bacon, "cannot take in all the cases which time may discover. . . . It is preposterous to wrest statutes to omitted cases."<sup>1</sup> Under a system of Common Law, as distinct from Statutory Law, the pretence to completeness is the more hollow. Much of the argument in defence of such completeness might be summarized as follows: There is a body of principles underlying the vast variety of legal rules; these principles are numerous and complementary; the office of the judge, in any case not provided for by express rule, is simply to apply these principles; his decision is no more than the logical consequence of these principles; it illustrates without adding to them. If judges were omniscient and the principles were eternal, this picture of judicial activity might answer to reality. But, on the one hand, judges are not omniscient; their view of a case is always more or less partial; and the rule which they apply is binding on future judges whether or not it be the precise logical result of all pre-existing principle. On

<sup>1</sup> "De Augmentis," Lib. VIII, "Works," V., 90, 91.

the other hand, the principles themselves, far from being eternal, must in the very nature of things undergo at the hands of both legislature and judges a progressive modification and development. The contrary view is a survival of the medieval conception of Natural Law as a part of the law of the land—a conception which may have been excusable in an age of undifferentiated knowledge, of theological moralities and theocratic politics, but long since definitely rejected for other conceptions more in harmony with the thought of our time.

556. It is interesting to consider for a moment the grounds of the judicial profession of incompetence to make new law. Those grounds were objective or subjective. Objectively, an open profession of the judges to apply new law might have brought them into conflict with the litigant and the public. The vanquished suitor may submit with resignation to what is declared to have been the law of the land, when he would have stoutly rebelled against a decision professedly applying new law. Humble before the long-established, he might have risen in revolt against the pretensions of the parvenu. Subjectively, on the other hand, the judges have been conservative to the extent of being timorous; and, in so far as they have innovated, they have sought to conceal the fact from themselves as well as from the general public. There is, moreover, a moral to the story of the learned judge who proposed to amend the opening phrase of a judicial opinion from "Conscious as we are of our infirmities" to "Conscious as we are of one another's infirmities." The judges, by nature conservative, fearful lest the element of certainty in judicial administration should be endangered, have striven to guard against unwise innovation by a declaration of *non possumus*. Lest they should innovate prematurely or capriciously, they have affected as a profession of faith that they cannot innovate at all.

Ancient  
utility of  
the fiction  
of judicial  
incom-  
petence.

Illustration from the French School of Interpretation.

557. To explain the historical origin of a fiction is not to justify it. I conceive that on this point we may draw an instructive moral from the history of the traditional school of interpreters of the Code Napoléon. The school accepted the completeness of the Written Law as a postulate. That law of course required interpretation; the interpretation might be grammatical, or it might be logical in the sense of effecting a reanimation of the texts by reference to the thought and inspiration of the legislative author; and in extreme cases, recourse might be had to analogical extensions of the text based on what the legislator might be presumed to have willed had his intentions been directed to the particular situation calling for judicial regulation. Beyond this, nothing was necessary. The results of this narrow view were exemplified in the course of the nineteenth century. The attempt to deduce from the will of the legislator more than the legislator had expressed, or could have been reasonably supposed to have intended, involved a highly ingenious logic, the development and multiplication of ideal conceptions attributed somewhat disingenuously to the legislator, though often enough having no other foundation than in the thought of the interpreter. These subjective products easily came to be regarded as permanent objective realities. The historical sense was sacrificed to the logical. The general result has been well stated by M. Boutmy. "Propositions abstraites, subtiles interprétations verbales, déductions fortement enchaînées, simplifications parfois excessives, conclusions toujours catégoriques, voilà dans quelle fréquentation de tous les instants l'intelligence apprend et aime à se mouvoir. 'L'esprit du géométrie' au sens où l'entendait Pascal, devient sa règle. Elle perd 'l'esprit de finesse,' tout en dépensant beaucoup de finesse d'esprit. Elle acquiert, exerce, et développe jusqu'à une maîtrise incontestée la faculté dialectique. Mais toute

supériorité se paie, et celle-ci est trop souvent achetée aux dépens du sens historique."<sup>1</sup>

558. If we turn from French to English soil, we find the fiction of legal adequacy present, though under differences of condition which have told for differences in result. From some evils we have been saved because we are less logically minded than the French. We are "practical," with the advantages as well as the limitations which the ordinary use of that much-abused term implies. Innumerable have been the cases upon which judges have been called to adjudicate where no existing rule of law was applicable. With those cases judges have dealt differently according to time, circumstance, and idiosyncrasy, generally displaying a strong desire to secure some kind of analogy to pre-existing law, but as a rule too "practical" to be at the mercy of purely logical considerations. It must not be supposed, however, that we have escaped evil consequences. Our system of Equity has had its admirers, but if Common Law judges had been more enlightened, our dual system of administrators, with all the disadvantages incidental to duality, would not have been called for. Moreover, the evils inevitably incidental to judicial law-making are greatly increased if the law-making has to make some attempt to accord with the fiction that it is non-existent. In the presence of such a fiction, our Common Law judges have been denied a theory of the persuasive sources of law. Formally acting on the assumption that the law is complete for all our needs, they could find no place for a theory of the relative value of those external sources from which, as a matter of fact, rules have often been drawn, e.g., the opinions of our jurists, the considerations of public policy, or the rules of a foreign law.

<sup>1</sup> "Revue de l'Enseignement," 1889, 1<sup>e</sup>, t. XVII, p. 222. Quoted Gény, "La Méthode d'Interprétation," p. 50.

The lack of such a theory tells, not merely against scientific development, but even against that certainty in administration upon which we are too apt to pride ourselves. Whatever way we regard the subject, we must conclude that we cannot use a fiction and remain its master; that we must always pay a price for the luxury of professing one thing while doing another.

Illustration of the need for a theory of persuasive sources : International Law.

559. I believe that the need for a comprehensive theory of the persuasive sources of legal rule is illustrated by a recent controversy as to the exact significance of International Law for the purposes of municipal tribunals. The great case of *R. v. Keyn* raised the question whether, supposing International Law to have conceded to municipal tribunals a jurisdiction over coastal waters, such concession could be accepted by municipal tribunals as a conclusive ground for exercising jurisdiction. The majority of the Court decided in the negative. Cockburn, C.J., in delivering the judgment of the Court, asked significantly: "Can a portion of that which was before high sea have been converted into British territory without any action on the part of the British Government or Legislature—by the mere assertions of writers on Public Law—or even by the assent of other nations?"<sup>1</sup> But to those students of modern society who have observed how the growth of trade and commerce, commerce of ideas as well as of goods, has brought nations into closer and closer relations with one another, and have remarked the resulting development of modern International usage, it must have become obvious that judges could not fulfil their proper functions in municipal life without at times and places giving some sort of recognition to International Law. Later judicial interpretation, at any rate, has shown a tendency to revert to an older doctrine, and to hold, with

qualifications, that International Law is a part of the law of England. "The proposition that International Law is part of the law of England," affirms a recent judgment of the Court of King's Bench, "requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country; and that to which we have assented along with other nations in general, may properly be called International Law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of International Law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the International Law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it,"<sup>1</sup>

560. The judgment in the two leading cases just cited appears to have created in some minds an impression of irreconcilable conflict.<sup>2</sup> Such conflict, however, ceases to exist if we once recognize that a *via media* exists between declaring International Law as such to be positive law, and declaring that the Courts will never enforce it. If we once recognize the truth that judges are often compelled to go beyond the existing law, it is possible for us to regard International Law as a code of rules which are not absolutely law and yet may be made from time to time the basis of judicial decision. In my opinion, neither of the cases

<sup>1</sup> *West Rand Central Gold Mining Co. v. The King*, 1<sup>st</sup> xciii. at p. 213, [1905] 2 K.B. 391.

<sup>2</sup> Cf. "Columbia Law Review," VI, i. 48.

above cited is inconsistent with the view that rules of International Law, though not as such binding on our municipal tribunals, must nevertheless exercise in particular cases a very material influence upon the decisions of those tribunals; that, like the principles of public policy, they belong to the list of persuasive sources of the law, and as such must exercise an increasing influence upon the development of our judiciary law in general, and even upon the interpretation of the Acts of our Supreme Legislature.<sup>1</sup>

What  
judges  
have really  
done.

561. It is a relief to turn from discussing the origin and disadvantages of an ancient fiction to consider more in detail how, as a matter of fact, judges act in dealing with cases not governed by pre-existing rule. In the first place, they do not necessarily refuse to decide the case by reference to the simple principle of holding for the defendant. In the second place, they reveal in their judgments, not merely the influence of ancient and established ideas and beliefs, but also the influence of a Time Spirit, thereby giving expression to rules which are new, both in the sense that they have not found expression in an earlier case, and in the sense that they could not have done so. So far, however, there is no claim to make new law. The function of the judges being to decide disputes in accordance with law so far as that may be possible, but in any case somehow—in short, to administer justice—the mere fact that they apply a rule does not of necessity make that rule a part of the law. Comparatively early in English legal history, however, judges elected to be bound by precedents, not with the idea of magnifying the judicial office, but rather with the idea of limiting the judge. The discretion of the single judge

<sup>1</sup> Cf, however, Walker, "The Science of International Law," pp. 44-56; Holland, "International Law and Acts of Parliament," *Law Quarterly Review*, IX, 136-52; Westlake, "Is International Law a part of the Law of England?" *Law Quarterly Review*, XXII, 85 (January, 1906)

was qualified by the necessity of deciding in harmony with the decisions of predecessors. As a result of the adoption of this principle, legal decisions give rise to new law. So general rules, legal conceptions, and legal principles are reached through a long series of decisions slowly working towards conclusions which at first were felt dimly or not at all. The older law is vivified by the infusion of elements drawn from the social life. Usage and opinion, social aspiration and economic needs, react upon the older law, adapting its texts, modifying their operation, developing their content, restraining, amplifying, and controlling in a thousand subtle and invisible ways. Even the judicial decision which seems merely to illustrate pre-existing law often adds to it. In purporting to apply a rule, the rule itself is modified. For the rule is held to be found, not in the language of the judges, but in the facts and the decision. Each time a new case is tried these facts are different. Each difference of fact creates new possibilities of interpretation. As a result, the most conservative and timid of judges, however strenuously seeking to shelter himself behind the authority of earlier decisions, is driven by a power beyond his control to take his place in the ranks of the makers of law!

562. The judge, then, is a law-maker. What are the limits to his action in this capacity? In the first place, judges do not make law which is directly contrary to Statute. The judicial interpretation of Statute in the past may seem to throw a doubt on this statement. As Lord Hardwicke said of the historic act of legislation which became the basis of modern conveyancing, "A statute made upon great consideration, introduced in a solemn and pompous manner, by a strict interpretation has had no other effect than to add at most three words to a conveyance." Curiously enough, this was an understatement of the defeat

II. Limitation upon judicial action.  
(1) Judge cannot overrule Statute.



of the legislative purpose. The Act not only failed to achieve its purpose, but even extended the evil which it was passed to prevent. The phenomenon, moreover, is not entirely a matter of antiquity. High authority has declared with regard to some of the rules of modern interpretation that they imply "that Parliament generally changes the law for the worse, and that the business of judges is to keep the mischief of its interferences within the narrowest possible bounds."<sup>1</sup> Such statements might lead us to suppose that the judicial deference to Statute is on a level with their pretence to make no new law—a fiction serving useful purposes, but to be carefully distinguished from legal theory. The time for holding such a view, if it ever existed, is long since past. Where the will of the legislator is clearly expressed, the judge of to-day will enforce it, and will leave the legislator to deal with any unpleasant consequences that may follow. If the legislative purpose is ever defeated by judicial interpretation, it is not because of any legislative ambition on the part of judges, but because the legislative purpose has been ill-expressed. It is the result of an excessive deference to the letter, not of a will to control the spirit. The celebrated case which finally established the principle that the House of Lords is bound by its own precedent is no exception to the position just laid down. Although the court of final appeal will not reconsider its interpretation of a previous statute, however erroneous that interpretation may seem to be, the supreme legislature might declare the interpretation to have been erroneous; and the declaration would be accepted by all Courts as final.

(2) Precedent and judicial practice.

563. In the second place, judges cannot overrule a law which their own practice has sanctioned. An isolated precedent, with the exception of a decision of the House of

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<sup>1</sup> Sir Frederick Pollock: "Essays in Jurisprudence and Ethics," p. 85.

Lords, may be overruled as contrary to law or reason. A rule established by judicial practice cannot be so overruled. Positive proof that a particular precedent had been decided wrongly would avail nothing in the face of the fact that the precedent had become the basis of later judicial practice. Language has been employed at times which suggests that the distinction between precedent and practice has ceased to have any real value. "At the present day," writes Professor Salmond, "judicial usago is no longer reckoned as one of the sources of our law, for its operation as such has been merged in precedent."<sup>1</sup> But apart from the liability of an isolated precedent to be overruled as already stated, legal theory requires us to distinguish between precedent and practice for at least two reasons. (a) The single precedent, as an authority, is more or less of an abstraction. As an authority it binds when the facts of future cases are identical. In reality the facts never are identical. They may come within the operation of the underlying principle of the given case, but that underlying principle is normally based on, and implies, a number of previous decisions. We are not likely to apprehend it correctly unless we know the pre-existing state of the law. (b) If we inquire why precedents make law, as undoubtedly they do, we must look to that practice which has established and maintains that validity. If the question be asked, why is precedent binding in England, I think it a true and useful answer to say that it is binding, because the practice of the Courts has so decided. Although the distinction between judicial practice and precedent is but inadequately realized in our Courts, although, as our French critics tell us, we suffer from "*la superstition du cas*,"<sup>2</sup> nevertheless, the distinction exists, and in proportion as the Law Reports increase in

<sup>1</sup> "Jurisprudence," p. 139.

<sup>2</sup> Cf. Lambert, "Études de droit commun législatif," I, 202.

volume, it is likely to receive a more complete recognition and a more fruitful application. In proportion as this recognition and application take place, our legal development will advance in scientific process. The search for "the case on all fours" will give way to the search for a principle expressed or embodied in a series of cases. The stage seems to have been reached already in some American Courts, thanks, perhaps, to the thoroughly scientific treatment of case law which has distinguished American Law Schools, but thanks even more to the increasing volume of reports issuing from the many co-ordinate systems of judicature.

(3) Statute may over-  
rule pre-  
cedent. 564. The third limitation upon the power of the judges to which I wish to draw attention is implied in preceding limitations, but deserves separate statement. No product of judicial precedent or practice is good as against a subsequent statute overruling it. It is, indeed, a part of the duty of the Legislature to watch the development of the law which takes place at the hands of the judges, and if need arise, to restrain or accelerate its movement. The duty is inadequately realized and perfunctorily performed, but has received from time to time dramatic expression.

III. Source  
of judicial  
authority. 565. The consideration of the foregoing limitations upon the capacity of the judge as law-maker should enable us to answer the question to which I shall now proceed. Whence does judicial practice derive its authority to turn precedent into law? Two answers to this question at once suggest themselves. We may say that the judicature acts as representative of the community, or that it acts as the delegate or agent of the organized Sovereign Power. The former answer is made by Mr. Bryce. "If we are to have a theory of the position of the magistrate or judge . . . we must call him the recognized and permanent organ through which the mind of the people expresses itself in shaping that part of

the law which the State Power does not formally enact."<sup>1</sup> The statement expresses an important and familiar fact. The judges, as part of the governmental machinery of the country, are, to a large extent, creatures of their time and place, animated by the time-spirit, subject to the prejudices and passions, endowed with the ideas, the hopes, and fears of their day and generation. In devising rules through the means of precedent, they give effect to principles which are a part of the social atmosphere around them. In a deep sense they are servants of the community.

566. If, however, we are to formulate a theory of the judicial office which will satisfy English Law, we must not stop short at this point. To do so implies a confusion similar to that between legal and political sovereignty. Judicial authority has a formal as well as a material source, and the distinction is one of great importance so far as English Law is concerned. In a Federal State in which no machinery was provided for amending the constitution, a different conclusion might be possible. The authority of the Courts as interpreters of the constitution would be absolute. I conceive, however, that the matter is quite otherwise in a Federal constitution where an organization of the sovereign power is provided behind the governments. Still more is this the case under a unitary system such as that which exists in Great Britain.

567. Little doubt seems possible on this subject if we regard in their totality the relevant facts of the existing British Constitution. As we have already seen, the judges *can* and *do* make law, but only in strict subordination to Parliament, which may set at naught their judgments and repeal the law which they have established. This subordination is not a legal fiction, but a reality sufficiently attested by

<sup>1</sup> *Essays in History and Jurisprudence*, p. 272.

experience. When any decision of the judges or principle established by them is seriously distasteful to Parliament, action will be taken to reverse the decision or to annul the principle. Moreover, the judges themselves may be dismissed by Parliament, and their tenure and authority may be regulated by Parliament. An Act which should expressly recognize and sanction the limited power of law-making at present assumed by the judges could scarcely be regarded as anything more than sanctioning expressly what is already sanctioned implicitly. Finally, the rule which the judges lay down is enforced, not by might of their own, nor by the might of the unorganized community, but by the might of the sovereign power. If these circumstances be regarded in their totality, it seems impossible to impugn the statement of the judicial office expressed by Willis, J., "We sit here as the servants of the Queen and Legislature."<sup>1</sup>

568. In a previous Excursus, I have stated that legal theory in England might come to recognize the claims of the State as a personality in which in the last analysis sovereignty must be held to reside. Even were this step taken, the British Parliament would still be the authoritative organization of that sovereignty; the Courts would still be subordinate to that organization and derive their authority immediately from it, if mediately from the community at large.

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<sup>1</sup> *Lee v. Buds and Torrington Railway Co.*, 1871, L.R. 6 C.P. at p. 582. Quoted Pollock, "First Book of Jurisprudence," p. 255.

## EXCURSUS D

### CUSTOMARY LAW IN MODERN ENGLAND

569. The nature of customary law has been for ages one of the most controversial subjects of Jurisprudence. As in the case of sovereignty, other explanations of the fact of controversy than the intrinsic difficulty of the subject may be easily suggested. Three deserve a brief mention: the eternal mobility of fact, the despotism of ulterior purpose, and the confusion of legal theory with legal fiction.

570. The ever-changing nature of the material with which the student in the social sciences has to deal makes all his generalization provisional. Each decade adds its contribution to the raw material; and each generation, however sensible it may be of its indebtedness to the past, lies under the eternal necessity to give its own account of things or rest a defaulter. The garment which was devised for the ancestor, however cunningly shaped, will never quite fit the heir, and may at times be indeed ludicrous. The part of custom in the social life is no exception to the rule. A theory about it which has become established, ought probably to be obsolete. The most superficial examination of its history will convince us that its importance and authority have varied indefinitely from age to age. There have been periods when it is paramount; periods when it seems a mere fiction to conceal a judicial activity; periods when it is revered and periods when it is denied. Needless to add, similar divergences exist with regard to different countries. He would be a rash student who should contend that the refusal of French

jurists to admit the law-creative power of custom in modern France, is a valid proof for jurists who have to deal with a non-codified system of law. Researches in Comparative Law and Comparative Legal History have accordingly a varying value according to the particular point of view. The value is only persuasive for English lawyers who are anxious for a theory which will fit precisely the facts of modern English Law. In the present inquiry, only the more modest and more practical object is pursued. The task of constructing a universal theory of customary law which shall relate to the past as well as to the present, to uncivilized and civilized, to Hindu, Celt, Teuton and Roman, I leave to the philosopher of legal history who shall have the courage to venture upon the undertaking.

The  
despotism  
of ulterior  
purpose.

571. Accounts of customary law have been written, less often to represent actualities, than to promote an ulterior purpose—to justify a political or constitutional policy, to secure the triumph of Roman Law at the expense of local laws, to justify or deny the validity of judicial legislation, or to support some *a priori* theory of the nature of law in general. As a result, that which may have purported to be scientific has been polemic. It is not surprising that a theory which in its time has played so many parts should present strange metamorphoses not to be explained by any variations in the raw material. Canonists and post glossators wrangled about the nature of the mental element in the conception of custom, *opinio necessitatis*, more concerned to secure the sanction of classic texts than to represent the real facts of mediæval life, and apt to find a solution of their difficulties in various interpretations of a tacit consent of the populace regarded atomistically in accordance with classic models.<sup>1</sup> So too, if we turn from the mental to the material element

<sup>1</sup> Cf. the historical sketch by M. Lambert, "Études de droit commun législatif," pp. 111-73.

in custom, we find equally important divergences of opinion which are often inspired by merely *a priori* conceptions. The school of Savigny and Puchta, under the spell of an excessive subjectivism, was almost prepared to dispense with its existence.

572. Juristic controversies, moreover, have been darkened by a confusion between legal theory and fiction. What is dignified as legal theory is often no better than a transparent fiction, or at best a blending of both, or a transition from one to the other. When first expressed, the theory was perhaps a true representation of the facts with which lawyers as such were concerned. Time has changed those facts, but the theory remains. The distinction under consideration must not be confused with that between Constitutional Law and Convention. With the last-mentioned subject the lawyer is not directly concerned. The distinction is that between the rational and the merely nominal version of legal facts. Two familiar instances may be quoted in illustration. It is sometimes said to be legal theory that English statutes are made by the King with the assent of the Lords and Commons. In reality, they are made by Parliament with the assent of the King. The older theory is interesting as an explanation of the origin of certain constitutional forms, but it has long since ceased to answer to actualities. Again, it is often said that English judges only apply pre-existing law. In point of fact, they often introduce new rules which have no foundation in either pre-existing law or custom. Yet the older theory on the subject survives, and even when its fictitious character is admitted, it is apt to reassert itself in some form or other. Lest such dangers should prove imaginary, I will quote what appears to me to be an example in a recently published work of no less distinguished a scholar than Mr. Bryce. The learned author, while admitting the reality of judicial law-making,

The  
confusion  
of legal  
theory  
with legal  
fiction.



proceeds to refute the view that such law-making may be regarded as effected in furtherance of a sovereign delegation. "The theory of the English Law and Constitution has remained, in these points, substantially unchanged. That theory is that the judges of the Common Law Courts are nothing more and nothing less than the officers who expound and apply the Common Law, a body of usages held to be known to the people, and by which the people live."<sup>1</sup> We cannot suppose that Mr. Bryce is ignorant of the fact that judges make law, since he expressly admits it. He denies, however, that they make law as delegates of the sovereign power, and his reason for this is a legal theory which, by his own initial statement, is a fiction. It is difficult to see how one can uphold the view that judges make law, and then call in evidence the theory that they make no law but only declare custom, as a proof of the authority by which they act. Similar examples from the works of less distinguished authors might be added indefinitely. A sound legal theory should represent those realities of which so-called legal theory is frequently very deceptive evidence.

Judicial v. popular custom. 573. The moral of the foregoing considerations may be briefly stated. A sound theory of customary law must be based on the existing facts, and not upon any *a priori* conception of the nature of law in general, or upon any of the many fictions which mask as legal theories. As regards English Law, certain of these basic facts are quite clear. Before proceeding to their statement, however, we must carefully distinguish between two kinds of custom which are often confused. There is the custom of the people or a class; there is the custom of the Courts. The distinction is frequently overlooked, and statements are made in regard to custom as embracing both kinds which really hold only with

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<sup>1</sup> "Essays in History and Jurisprudence," II, p. 270.

regard to one. Both may be ultimately embraced in a single theory. At the outset it is imperative to distinguish between them. I propose accordingly to dwell at some length on custom in the sense of popular usage.

574. The first and most obvious of the facts with regard (1) Popular custom  
to popular custom relates to its character as an important a source of  
source of legal rules in time past. A very large part of the law in the  
English Common Law, from whatever power it may have past;  
gained its authority as *law*, has been developed as *rule* by  
the processes of popular observance.

575. A second fact is that custom remains, and must con- (2) shall a  
tinue to remain, a source of legal rules. So long as a people source of  
is progressive, the need for new regulation will be felt by law,  
each generation. Inevitably the official agencies for meeting  
that need will be imperfect. So long as they are imperfect,  
the generations will be compelled to work out their own  
salvation, whether under the influence of an irresistible  
juridic sentiment, or in the consciousness of a purposeful  
adaptation to new conditions. Statutes and judicial decisions  
in particular cases may anticipate the process, or may give  
to it a formal sanction. The process goes on eternally in  
obedience to a law which is higher than judge or legislator,  
and is founded in the very nature of man. "Usage adopted  
by the Courts," said Cockburn, C.J., delivering a judgment  
of the Court, "having been thus the origin of the whole of  
the so-called Law Merchant as to negotiable securities, what  
is there to prevent our acting upon the principle acted upon  
by our predecessors, and followed in the precedents they have  
left to us? Why is it to be said that a new usage which has  
sprung up under altered circumstances is to be less admissible  
than the usages of past times? Why is the door to be now  
shut to the admission and adoption of usage in a matter  
altogether of cognate character, as though the law had been

finally stereotyped and settled by some positive and peremptory enactment?"<sup>1</sup>

(3) may  
be founded  
on judicial  
decision.

576. That custom is often posterior to judicial decision is another fact about which no difference of opinion is possible. Under the pretence of declaring custom, judges frequently give rise to it. The phenomenon is ancient as well as modern. "Above all local customs," declare Pollock and Maitland, in speaking of justice under the Norman kings, "rose the custom of the King's Court. The jurisprudence of this court, if one may use so grand a phrase, was of necessity a flexible, occasional jurisprudence, dealing with an unprecedented state of affairs, meeting new facts by new expedients, wavering as wavered the balance of power between the king and his barons, capable of receiving impressions from without, influenced by the growth of Canon Law, influenced perhaps by Lombard learning, modern in the midst of antique surroundings. . . . It was not a jurisprudence that had been transplanted from Normandy, but it had been developed by a Court composed of Frenchmen to meet cases in which Frenchmen were concerned. . . . The future was to make the jurisprudence of the King's Court by far the most important element in the law of England."<sup>2</sup>

577. The facts of medieval history thus suggest the evolution of legal rules through judicial decisions based on equity rather than law, but tending to harden into a judicial usage, and thereby to create or to shape popular usage. In speaking of the age of Bracton, the learned authors just quoted remark: "Even the knights who were employed to take assizes in their shires, though they had read no law, would believe that they knew the law and custom applicable to the cases that came before them. Every man who does his duty

<sup>1</sup> *Goodwin v. Roberts* (1875) L.R. 10 Exch. 337, 352.

<sup>2</sup> "History of English Law," I, 85, 86.

knows a great deal of law and custom; the difficulty is to persuade him that he does not know everything."<sup>1</sup>

578. So far we have not had occasion to enter the region (4) When of controversy. At the present point, however, two very de-<sup>does</sup>batable questions call for consideration. When does custom<sup>custom</sup> become positive law? Whence does custom derive its author-<sup>become</sup>ity to rank as positive law? I propose to discuss the first of<sup>law?</sup> these questions in some detail. At the outset we must distinguish between several classes. There are customs which the people observe, in relation, for example, to such matters as the details of manner and costume, which are not law and in all probability never will become law. There are customs which, though they may hereafter satisfy certain tests which judges have affirmed, do not satisfy these tests at the present time. These are not now laws, though they may become so. Again, there are customs which have been definitely adopted by the judges. These are undoubtedly a part of the law of the land. "When a general usage has been judicially ascertained and established," said Lord Campbell, "it becomes a part of the Law Merchant, which courts of justice are bound to know and recognize."<sup>2</sup> Lastly, there are customs which, though they have not been definitely adopted by the judges, nevertheless appear to satisfy the judicial tests. The precise legal character of these is a matter about which different opinions are entertained by different writers.

579. According to the more popular doctrine, customs *may* be laws, and not infrequently *are* laws, even before their adoption by the Courts. The arguments by which this doctrine is supported deserve careful attention. We are told that it corresponds with the language of the judges, and that it is implied in the retrospective operation given by judges

<sup>1</sup> "History of English Law," I, 163.

<sup>2</sup> *Brandao v. Barnett* (1846) 12 Cl. and F. at p. 805.

to customs of which they approve. We are told also that customs are laws because the judges are *bound* to enforce them.

(a) The  
language  
of the  
judges.

580. The argument from the language of the judges is open to suspicion. What judges do, and what they profess to do, are not always the same, and the latter is only evidence of the former—often very misleading evidence. In particular, the judicial theory of customary law seems to have been elaborated with the object of concealing facts rather than representing them. It has been, not a scientific analysis of custom, but a fiction to serve useful purposes. The judge, like the priest, has legislated; but whilst the latter has attributed his activities to a Supernatural origin, the former has been content to throw the weight of responsibility upon the mundane shoulders of the community at large. Sometimes enforcing custom, sometimes creating custom, judges have found the formula of immemorial usage a convenient cloak beneath which they might perform no end of tricks to dazzle the credulous. In particular, we in this later day cannot too much admire the ingenuity with which judges in a past age have made royal justice prevail under the pretence of declaring popular usage, in reality deposing usage in the name of usage. Yet, if we would substitute rational theory for ancient and once serviceable fiction, we must recognize that judges have made laws, and continue to make laws, and that in consequence the language of the judges in relation to such subjects as the true nature of custom must be regarded with considerable suspicion. Like the evidence of a discredited witness, it *may* be true, but we are not entitled to assume its truth in the absence of more convincing testimony.

(b) The  
retrospec-  
tive nature  
of the

581. The argument which is based upon the retrospective operation of the judicial adoption of custom deserves a more serious attention. It is supported by no less an

authority than Professor Holland. "To such customs as judicial come up to a certain standard of general reception and usefulness the Courts give operation, not merely prospectively from the date of such recognition, but also retrospectively; so far implying that the custom was law before it received the stamp of judicial authentication. The contrary view, supported by Austin, is at variance with fact."<sup>1</sup> The language suggests that the retrospective operation of the judicial adoption of a custom is a *proof* that the custom is already law. Such a view, however, would compel us to hold that rules of law which have been founded on principles of public policy and adopted in judicial decision were law before so adopted. The rules of law relating to undue influence, to take a familiar illustration, have been developed by the judges and applied retrospectively. They were not laws, however, prior to such adoption. That laws should not be made to bind retrospectively is a rule of expediency, not an *a priori* necessity. It is a rule, moreover, which applies with greater force to the judicial applications of public policy than to the judicial adoption of popular custom, since people are more to be blamed for violating a rule with which they have been acquainted in the form of a popular usage, than for violating a rule which perhaps represents no more than the judicial perception of the expedient. In short, we have to reckon with the fact that the State is a very imperfect institution. It cannot foresee all possible contingencies, or determine in advance how far general rules of law should be modified on particular occasions or in particular localities. Its chief function is the maintenance of some kind of order, and in the fulfilment of this function its organs employ devices which are at once seriously objectionable and imperatively necessary.

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<sup>1</sup> "Jurisprudence," 9th ed., p. 57.

Justice  
wider than  
law.

582. It is a fact upon the importance of which too much emphasis cannot be laid that the justice which it is the function of the Courts to administer is wider than law. In a world where all things were ideal, the judge would have no more to do than to ascertain the facts and apply to them the rule of law. In the world in which we live, there is often no precise rule to apply to the group of facts which demand adjudication, either because the occasion has been wholly unanticipated, or else because the matter of dispute falls within the scope of some legal rule, which is so general in its character as to leave considerable latitude in its application. In either case the precise rule which the judge applies is not necessarily law before such application. It may be added that it does not necessarily become law by such application. For although judges are constantly adding to the specific rules of law, working out in concrete and definite form standards of duty implied in the judicial conception of reasonableness, the process is carried on with very considerable caution, and subject to the judicial consciousness that in a world where possible combinations of fact are infinite, the proper elaboration of legal rules can never be carried to an extent which shall leave no discretion in the application. As Sir William Markby writes, "There are many rules made use of in English courts of justice which hover upon the borders of law, and we are hardly able to say whether they are legal rules or not. . . . There was at one time a struggle to establish a rule of law as to whether it was a breach of duty for the servants of a railway company to call out the name of a station before a train had reached the platform: for a time it seemed likely to be recognized that this was a matter of law, but it is now settled that each tribunal must determine in each case what is reasonable. . . . To say that a standard is to be applied by the jury is the same thing as to say that the standard is

not a legal one. But the non-legal standard is also applied in courts when there is no jury, and the nature of the standard does not depend upon the person who applies it."<sup>1</sup>

583. Finally, it is often asserted that judges are absolutely bound to decide in accordance with custom. If the assertion be true, the question is decided once and for all. The ground of the assertion is the reality of the deference which judges have undoubtedly displayed towards some customs. But this deference is quite consistent with the view that custom is a persuasive rather than an absolutely binding source of legal rule. Among the many historical sources from which judges draw rules for application to particular cases, there are many differences of kind and of degree. If we are comparing two such historical sources as a statute of the realm and the Code Napoléon, the difference is one of kind. If, on the other hand, the historical sources under comparison be a modern text-book of high repute and the Digest of Justinian, the difference is one of degree. According to the English theory of precedents, the proposition necessarily involved in a decision needs to be distinguished, not merely from the *obiter dicta*, but even from the judicial declaration of the grounds of the decision. The theory involves the recognition of three historical sources of which one is binding and two are persuasive, but of very different degrees of authority. "The practice of conveyancers amounts to a very considerable authority," declared Lord Eldon.<sup>2</sup> The judgments of the Privy Council, sitting as a Court of Appeal from the colonies, undoubtedly exercise a strong influence upon English courts in general. When it is once clearly realized that a much greater judicial deference to one historical source than to another does not imply of necessity a difference of kind, when it is once seen that there are

(c) Argument that customs are laws because judges are bound to enforce them.

<sup>1</sup> "Elements of Law," pp. 19, 20, and note.

<sup>2</sup> *Smith v. Earl Jersey* (1826), 3 Blyth 444.



sources of every degree of persuasiveness, sources which no judge dare overlook, and sources whose authority is so slight as to leave judicial discretion unfettered, we shall be better prepared to consider whether custom in modern English Law is an absolutely binding source of law or only one of the highest of the persuasive sources.

Customs  
as a per-  
suasive  
source of  
law.  
(a) Courts  
do not  
enforce  
custom  
merely as  
such.

584. The first of the arguments which seem to favour the view that custom is not law until it has been judicially adopted, is associated with the fact that courts never enforce custom as such, but only enforce custom as satisfying certain tests which the courts themselves have imposed. If we are to make of any custom a rule of law before adoption, we must argue that the judge is as helpless to amend or reject it as he would be to act in either of these ways towards precedent. It becomes, then, important to examine the tests which are alleged as differentiating customary law from mere usage.

Nature of  
the tests of  
customs—  
Different  
customs  
distin-  
guished.

585. What, then, are the tests? To answer the question we need to distinguish between three kinds of customs: (1) General customs, i.e. those which, though they may apply to particular classes of the community, are not limited to particular localities; (2) Particular customs, i.e. those which are so limited; (3) Customs which are deferred to, not as binding rules of conduct, but as affording an explanation or interpretation of some agreement; e.g. to show that in the lease of a rabbit warren the word *thousand* meant in that particular part of the country *twelve hundred*. Such customs are ordinary usages of a particular trade or district, with whose existence the contracting parties must be assumed to have been acquainted. They are not subject to ordinary rules for testing the validity of customs, and do not concern us here. With respect to the first two classes, we can scarcely do better than refer to certain learned authors who expound the more popular doctrine.

586. Sir Frederick Pollock states the general conditions required for the validity of *particular custom* as follows : Statement of Sir F. Pollock.

1. The custom must be reasonable, that is, it must not be repugnant to any fundamental principle of justice or law. "A custom is void which purports to enable an officer of a corporation to give a conclusive certificate in a matter in which the corporation is interested."<sup>1</sup>

2. The custom must have a reasonable commencement.

3. It must be certain.

4. It must be ancient.

5. It must be continuous, and must be regarded by the persons concerned as a binding rule, not as a matter of individual choice.<sup>2</sup>

587. Professor Salmond, after observing that a custom, in order to be valid as a source of law, must conform to certain requirements laid down by law, proceeds to state that the chief of these are as follows : Professor Salmond.

1. The custom must be reasonable. "The authority of usage is not absolute, but conditional on a certain measure of conformity with justice and public utility."

2. The custom must be accompanied by the intellectual element, *opinio necessitatis*, "the conviction on the part of those who use a custom that it is obligatory, and not merely optional."

3. It must be consistent with statute law.

4. It must have existed from time immemorial. But this is applicable to particular customs only. "If he who disputes its validity can prove its non-existence at any time between the present day and the twelfth century, it will not receive legal recognition."

5. It must be consistent with the common law. This is applicable only to recent custom. "Modern custom possesses

<sup>1</sup> *Day v. Savadge* (1614) Hobart 85.

<sup>2</sup> "First Book of Jurisprudence" (1896) pp. 264-6.

constitutive, but no abrogative power. . . . Immemorial custom, on the other hand, can destroy as well as create, so far as the common law is concerned."<sup>1</sup>

Stephen's  
Commentaries.

588. The fourteenth edition of Stephen's Commentaries (1903) contains the following account of general and particular customs:

I. General customs. "These form the Common Law in its stricter signification. . . . But here a very natural, and very material, question arises. How are these general customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges of the several courts of justice. They are the depositaries of the laws; the living oracles, who in all cases of doubt must decide according to the law of the land. Their knowledge of that law is derived from experience and study, from the '*viginti annorum lucubrationes*' which Fortescue mentions, and from being long personally accustomed to the judicial decisions of their predecessors. And indeed, these judicial decisions are the most authoritative evidence of the existence of the common law. . . . And thus much for the first ground and chief corner stone of the laws of England, which is general immemorial custom, or common law, from time to time declared in the decisions of the courts."

II. Particular customs. "The second branch of the unwritten law of England consists of *particular* (or *special*) customs affecting only the inhabitants of particular districts; and a custom of this kind it is usual to designate by the word *custom* simply, to distinguish it from the common law, or the *general* customs already spoken of. . . . The Law Merchant is not local, nor is its obligation confined to any particular district. Hence it cannot with propriety be considered as a special custom. The usages of particular

trades, where not restrained to some particular locality, must also be excluded, and for the same reason, from the technical name of customs. For, if there be any such usage of immemorial observance, authenticated by judicial decisions, it will form, according to our definition, part of the general law of England. If there be any sanctioned by Act of Parliament, it will constitute part of statute law. But for the rest, the want of any peculiar *locality* determines these usages to be no customs, and they are consequently no rules of law at all. . . . The rules relating to particular customs regard rather the *proof* of their existence, their *validity*, and their usual method of allowance when proved. First, as to *proof*. As to gavelkind and Borough-English, the law takes particular notice of them. . . . All other special customs must be expressly pleaded, and their existence must be shown, not merely that the thing in dispute is within the custom alleged. . . . When a custom is actually proved to exist, the next inquiry is into the validity of it. To make a custom good the following are necessary." The custom must be:

1. Immemorial.
2. Continuous.
3. Undisputed.
4. Reasonable.
5. Certain.
6. Obligatory.
7. Consistent with other custom.

"Next as to the *allowance* of special customs. No custom can of course prevail against the express provisions of an Act of Parliament. But, apart from this restriction, a custom, being in derogation of the general law, must be construed strictly. . . . But though customs must be strictly, yet they need not in every case be literally, construed."<sup>1</sup>

<sup>1</sup> Stephen's Commentaries (1903), pp. 20-30.

Mr. Greer. 589. With the above accounts of custom it may be interesting to add the following statement from an article by Mr. F. A. Greer, on Custom in the Common Law: "It was in reference to 'particular customs' that the well-known tests of the validity of custom were laid down. It was said that the validity of a custom depended on its being (1) certain and unambiguous, (2) reasonable, (3) on its having existed from time immemorial. And it was further added that it should not 'exalt itself' upon the prerogative of the king: *Nullum tempus occurrit Regi*. . . . The first condition, certainty, is indeed applicable to all cases where custom is suggested as the basis of rights. But it is not properly a condition at all. It merely amounts to the obvious proposition that a custom is a different thing from a variable practice. . . . Both the second and third conditions are properly applicable only to particular or local customs. They were used by courts of law as a means of checking the indefinite growth of local customs."<sup>1</sup>

The foregoing state-  
ments  
compared. 590. A comparison of the foregoing accounts suggests several interesting facts. As regards general customs, for example, it is affirmed by Professor Salmond that they must be reasonable, obligatory, in conformity with statute law and, unless immemorial, in conformity with common law. On the other hand, Mr. Greer repudiates such tests as reasonableness and antiquity, whilst in Stephen's Commentaries all legal validity is denied to the custom until it has been "authenticated by judicial decisions." In other words, one of these authors holds *some* general customs to be law, another seems to be disposed to hold *all* general customs to be law, whilst a third will admit *no* general custom to be law except as judicially sanctioned. With regard to particular customs, we find a nearer approach to unanimity, at

least to the extent of an agreement that some particular customs are laws before being judicially adopted. But immediately we turn to inquire *which* particular customs, unanimity is at an end. One writer proposes five tests, another four, a third eight, and a fourth three. Although the divergences are in reality less serious than this merely numerical test might seem to imply, their very existence is suggestive. It impels us to ask whether, in a more rational view of the tests of the validity of customs, we should not regard them as aids to the judges to guide them in dealing with a persuasive source of law, than as qualifications which define what is already law.

591. Such a view receives some encouragement from a (b) The consideration of the traditional attitude of the judges in <sup>attitude of judges</sup> relation to the tests of the validity of custom. *Particular* <sup>towards the tests.</sup> *customs*, to deal first with the more difficult instance, have <sup>1<sup>o</sup> Particular</sup> not been received into the law in time past as a matter of <sup>customs.</sup> course. In the first part of Coke's Institutes we find a very interesting paragraph in which the question is raised as to what customs may be alleged in an upland town, and what in cities and boroughs. The note of the learned editors remarks: "The privilege of having special customs, derogating from the Common Law, is in general denied to inferior places, such as upland towns, not being either cities or boroughs, and hamlets; though it is allowed to larger or more important districts, such as counties, manors, hundreds, honors, cities and boroughs. The special cases hinted at by Lord Coke as an exception to this restraint, seem to be those in which the custom tends to advance some right recognized by the Common Law."<sup>1</sup>

592. Again, the use that is made by judges of the test of <sup>E.g., test</sup> *reasonableness*, as to the existence of which all authorities <sup>of reasonableness.</sup>

are agreed, is very suggestive. The general disposition of Coke in regard to customs is expressed in the familiar statement "Consuetudo is one of the maine triangulos of the lawes of England: those lawes being divided into common law, statute law, and custome." When, however, the great judge is dealing with the statement that customs must not be against reason, he adds significantly, "This is not to be understood of every unlearned man's reason, but of artificiall and legal reason warranted by authority of law: *Lex est summa ratio*."<sup>1</sup> Later on, in discussing the validity of a custom, alleged to be ancient, that every tenant within a certain manor who marries his daughter without the Lord's consent shall pay a fine to the Lord, the learned author follows Littleton in repudiating the custom as contrary to reason. "Some have thought that such a custome generally within the manor should be good. But the answer is, that though it may be so in a particular case upon such a special reservation of such a fine upon a gift of land, yet to claime such a fine, by a generall custome within the manor, is against the freedome of a freeman, that is not bound thereunto by particular tenure."<sup>2</sup>

Other  
tests.

593. The element of *certainty* has been a further means of controlling custom. Thus in the case of *Nailor, qui tam*, v. *Scott*, where a custom had been found by a jury "that every housekeeper in the parish of Wakefield having a child born there, should, at the time when the mother was churched, or at the usual time after her delivery when she should be churched, pay tenpence to the vicar," the court determined that the custom was bad for uncertainty, since the usual time for women to be churched was not alleged.<sup>3</sup> Of all the tests, however, perhaps the one which might be expected to have required most elucidation is that described as *opinio*

<sup>1</sup> Coke on Littleton, 62a.

<sup>2</sup> *Ibid.*, 139b, 140a.

<sup>3</sup> Smith's Leading Cases, 10th ed., I, p. 532.

*necessitatis*. The general meaning of this test came under discussion in the interesting case of *Meyer v. Dresser*.<sup>1</sup> In that case the attempt was made to establish judicially an alleged general custom giving to a consignee of goods, or an endorsee of a bill of lading, the right to deduct the value of missing goods from the freight. It was held by the judges that the alleged custom was merely a convenient practice for settling undisputed claims, and not applicable in case of contested rights,—a mode of settling accounts, not a foundation on which to rest a legal claim. So far as I am aware, however, the difficulties involved in the conception of *opinio necessitatis* have not received an adequate attention at the hands of English judges or English lawyers or jurists. A perusal of the controversial literature of the Continent upon the point might serve to warn us against too hastily underestimating the difficulties which are really involved.<sup>2</sup>

594. As regards *general customs*, the leading modern case is *Goodwin v. Roberts*.<sup>3</sup> I shall venture to quote certain dicta from the judgment of this case, though with some hesitation, for the reason that the judges as a body have so clung to the fiction that they only apply pre-existing law, that their real attitude is more to be gathered from a consideration of the facts of many decisions than the language of the judges in any one. Curiously enough, however, in the leading modern case, the very language of the judges will be seen to favour the interpretation of judicial decision as transforming custom into law. The judgment of the Court (Cockburn, C.J., Mellor, Lush, Brett and Lindley, JJ.) contains the following statements: "The substance of Mr. Benjamin's argument is, that because the scrip does not correspond with any of the forms of the security for money which have hitherto been

<sup>2</sup> General customs.

<sup>1</sup> (1864) 33 L. J. C. P. 289.

<sup>2</sup> Cf. Lambert, "Études de droit commun législatif," I, pp. 120 seq.

<sup>3</sup> (1875) L. R. 10 Exch. 337.



held to be negotiable by the Law Merchant, and does not contain a direct promise to pay money, but only a promise to give security for money, it is not a security to which, by the Law Merchant, the character of the negotiability can attach. Having given the fullest consideration to this argument, we are of opinion that it cannot prevail. It is founded on the view that the Law Merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. . . . The Law Merchant is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by decisions of Courts of Law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience. . . . By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it." The judgment proceeds to discuss the history of the development of the Law Merchant, and then continues: "But Holt having become Chief Justice, a somewhat unseemly conflict arose between him and the merchants as to the negotiability of promissory notes, whether payable to order or to bearer, the Chief Justice taking what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments. The inconvenience to trade arising therefrom led to the passing of the statute of 3 and 4 Anne, c. 9." The Court, after considering later judicial controversies, proceeds to ask: "Why is it to be said that a new usage which has sprung up under altered circumstances, is to be less admissible than the usage of past times? . . . The universality of a usage voluntarily adopted between buyers and sellers is conclusive proof of its being in accordance with

public convenience; and there can be no doubt that by holding this species of security to be incapable of being transferred by delivery . . . we should cause great public inconvenience."<sup>1</sup>

595. In reviewing the preceding argument, I may remind the reader that discussion has turned, not upon the question whether judges should *defer* to usage, but upon the question whether they are *bound* by usage. I began the consideration of this question by remarking the inconclusive character of the arguments commonly held to justify the traditional view. The language of the judges, for example, is open to considerable suspicion in view of the persistence of the fiction of judicial incompetence to add to the law. Until that fiction is definitely rejected, we can hope for no sound theory of the relation of the judges to the development of new rules. Again, that the judicial adoption of custom is retrospective proves nothing, for this is a characteristic of judge-made law in general, an inevitable result of the imperfection of human institutions, the sacrifice of formal justice that in the long run substantial justice may be done. The fact that judges often base their decision upon custom is paralleled by the fact that judges often base their decision upon convenience; in determining the significance of all such action, we must remember that in the unideal world wherein we live, justice is wider than law; that much to which judges pay great deference is in no sense law and does not even of necessity become law as a result of the judicial decision.

596. On the other hand, there are real difficulties in the way of calling customs, as such, laws. Tests exist for deciding what customs are to determine or influence judicial action, but the writers who tell us what these tests are, differ from one another in important respects. The use,

<sup>1</sup> (1875) L. R. 10 Exch. 352. Cf. also *Rumball v. Metropolitan Bank* (1877) L. R. 2 Q. B. D. 194.

Review of  
preceding  
argument.

moreover, which judges make of the tests, and the important rôle which the argument from convenience plays in the judicial trials where customs have been approved, tend to confirm a suspicion of the existence of a fundamental difference between the attitude of the judges in dealing with custom, and their attitude in dealing with sources of law which are undoubtedly binding.

Diffi-  
culties  
suggested  
by the  
analogy of  
customs to  
judicial  
precedents  
and  
by-laws.

597. Among the binding sources of law, however, there are two classes which raise at this point some real difficulties. The precise conditions under which precedents are binding are nowhere clearly stated. Municipal by-laws it is said must be in conformity with the general law of the land, *intra vires*, reasonable, just, certain, etc.<sup>1</sup> As no one would deny that precedent and by-law are binding sources of law, it might seem that the value of the preceding argument as to the tests of custom is seriously, if not fatally, prejudiced. I do not think, however, that it would be difficult to establish a real difference in modern judicial administration between the application of a precedent or a by-law and the application for the first time of a popular custom,—a difference that, as regards the test of reasonableness, for example, might be expressed by saying that precedent and by-law bind unless obviously unreasonable, whilst a custom must be proved positively to be reasonable and in accord with public convenience. Moreover, that the line between the binding and the persuasive sources of legal rule should be drawn somewhere beneath precedent and by-law and above popular custom, is made *a priori* probable by certain leading tendencies of social evolution to which I shall now proceed to draw attention.

(c) Argu-  
ment from  
the facts

598. In the first place, the tendency of social evolution is towards conscious regulation in the place of unconscious

<sup>1</sup> Cf. Adler, "The Law of Corporations," p. 63.

regulation. The struggle for existence goes on eternally, but the knowledge of the fact in its practical bearings and implications is relatively modern. The knowledge brings far-sighted action of reflecting human beings in the place of the spontaneous development of rules. Law-making, whether by judges or usage, from being largely unconscious tends to become increasingly conscious. "Primitive societies and undeveloped races," writes Professor Sorley, "are more prone to be governed by external circumstances than to reflect upon their nature and tendencies, and hence their ideas of legal relations are for the most part the mere reflection of customs inherited from a previous generation or necessitated by outward events." But in developed and civilized communities, where men have learned the lesson of reflection, the tendency is in the opposite direction; custom has to justify itself at the bar of reason, and conduct comes to be guided by a definite conception of its end, instead of by a vague belief that it is usual.<sup>1</sup> In the second place, social evolution has implied, not merely an increase in conscious regulation, but also the development of appropriate organs for this regulation. The relative position and importance of these organs vary from time to time. A claim on the part of one law-making organ to be something other than an organ, revives older sources of law by inevitable reaction. Patrimonial theories of the State and doctrines of an absolute sovereignty, for example, have driven men to contend for the aboriginal rights of the unorganized community. The general tendency, however, is towards a just appreciation of the position of law-making organs, and a corresponding limitation of the term law to what is developed by organs specially provided by the State for that purpose. Finally,

<sup>1</sup> *Essays in Philosophical Criticism*, pp. 109, 110.

social evolution has worked for an increasing definiteness, substituting, as Herbert Spencer would say, definite heterogeneity for an indefinite homogeneity. In the sphere of law this increased definiteness has led to a differentiation of the natural and political bases of law, and a differentiation of the sources of law into respective hierarchies of those which are legal and those which are merely persuasive.

Significance of such facts for present purposes.

599. The relation of these tendencies of the social evolution to the question immediately under consideration must be apparent. Judges and by-law-making authorities are organs of the community which, in different ways, are called upon to make new law. Their work is, or tends to become, conscious and rational. The products of their law-making action are definite and knowable. In all these respects they stand on a somewhat different level from popular custom in which the spontaneous takes the place of the conscious, the unorganized of the organized, the indefinite and unknowable of the definite and knowable. It has been long felt to be a serious difficulty in the way of the traditional theory of custom, that if customs may be law before judicial adoption, a part of the law of the land is not only unknown of the judges, but is practically unknowable save by the circuitous process of proof by evidence of witnesses. A further practical proof of difference may be seen in the decline of custom as a matter of fact. It is not uncommon nowadays to limit the law-making power of custom to particular customs, and in regard to these an author who cannot be accused of underestimating their importance or authority remarks, "The truth is that in modern times there is an express demand for legislation as soon as there is any decided trend of opinion. Except in matters outside the scope of positive law the formation of custom belongs to an archaic period in our history."<sup>1</sup>

<sup>1</sup> Pollock, "First Book of Jurisprudence," p. 266.

Judicial precedent, not popular custom, is the extra-legislative source of law to-day.

600. The general conclusion at which I have arrived may be expressed in a sentence. When judges, in applying a custom which is not yet judicially authenticated, declare the custom to have been law previously to the decision, they are merely displaying a special form of the fiction of judicial incompetence. In the relatively developed character of modern institutions, more especially in regard to the development of the special organs for the amelioration and development of legal rules, it appears to me that the time has arrived for a clearer limitation of the contents of law, and for the development of a theory of those persuasive sources of law (including custom) to which judges may have recourse in cases where there is an imperative call either for a new rule or for the variation of an existing rule under particular circumstances of locality.

601. I pass from the discussion of the question as to the moment when we are justified in saying of custom that it is law, to examine the theory that custom is law, not merely before judicial adoption, but independently of such adoption, and by an inherent and ultimate authority of its own. Granted, it has been urged, that a custom comes within the judicial conception, and it is treated with all the deference due to an Act of Parliament. Judges may make precedent a binding source of legal rule; custom is such independently of any authority either of a single judge or of a succession of judges.

602. The theory recalls the period in our legal history when competent lawyers doubted whether a statute had any authority to overrule usage, and regarded usage as a law-creating power co-ordinate with Parliament rather than subordinate to it. In our own day it is not custom as such which is enforced, but custom as satisfying certain tests

which the judges themselves have fixed, and which they may vary if in their wisdom they think it desirable to do so. The real source of the authority of *general custom* is sufficiently attested by the requirement that it must be reasonable, and by the emphasis laid by the judges upon considerations of public policy and convenience in cases where their validity comes before the courts.<sup>1</sup> In respect of *particular customs*, the single circumstance that they must be immemorial in itself disposes of any claim to possess an inherent authority. To hold that they must be well established is consistent with such a claim; to hold that they must be established from time immemorial is completely fatal to it. I conceive that in this matter it would be interesting to imagine a country of which the courts should assume the right of picking and choosing between statutes, saying of some: Yes, these are good; though their contents are not quite ideal, they satisfy—as a matter of fact—the conditions which we have laid down, and we will apply them. If such courts existed I do not think we should attribute to statute as such an intrinsic authority. We should be more inclined to hold that if the courts had picked and chosen among the statutes, and had laid down the conditions which must be satisfied by a statute before it would be enforced, such intrinsic authority as existed must be looked for rather in the judicial practice than in the statutes themselves.

Signifi-  
cance of  
the test of  
reason-  
ableness.

603. The emphasis which I have laid upon the test of reasonableness may seem excessive in view of the fact that there was a time in our legal history when it was held that an Act of Parliament itself might be void as unreasonable. In the face of such a condition of things, it might be urged that the requirement that a custom must be reasonable involves no denial of its intrinsic authority. But we need to

<sup>1</sup> For example, *Goodwin v. Roberts* (1875) L. R. 10 Exch. 337.

consider precisely what was meant by the doctrine that an Act of Parliament might be void as unreasonable. In a leading case on this point, the judgment of the court contains the following significant statement: "Even an Act of Parliament made against natural equity, as to make a man judge in his own case, is void in itself. *Jura naturæ sunt immutabilia*, and they are *leges legum*."<sup>1</sup> The view that an Act of Parliament might be void as unreasonable was but one way of saying that Natural Law was a part of the law of the land. The Act of Parliament in obvious conflict with Natural Law was thus held to be void as being in conflict with a higher law of the State. When it became a recognized principle that Natural Law as such was not a part of the law of the land, it could no longer be held that an Act of Parliament was void as unreasonable. If, on the other hand, the question be asked, by what authority to-day can a custom be rejected as unreasonable? we can make no appeal to Natural Law or to any express Act of Parliament. We can only appeal, and naturally would appeal, to the judicially established rule.

604. The general conclusion, therefore, is that custom is law when it can be held that the judges are bound to enforce it. Though there may be some difference of opinion possible as to the moment when this can be said to be the case, I do not think there can be any difference of opinion on the point that judges are bound, not by any inherent intrinsic authority of custom, but by virtue of their own practice. To the question why custom is law no better answer can be given than that the judges treat it as such. The custom of the people is law, in so far as it is law, by virtue of the custom of the courts. Professor Dewey, in discussing the view that the judicial recognition of custom as law is due to an express or tacit law giving to such customs the effect of laws,

Some objections stated.

<sup>1</sup> *Day v. Savadze* (1614) Hob. p. 87.



remarks, "To say that customs are regarded as laws by virtue of a *tacit* law to that effect, is simply to beg the whole question. It is to say that custom is law in virtue of custom."<sup>1</sup> The criticism receives some support from Dr. Willoughby.<sup>2</sup> "The law-creating power of custom," argues Professor Salmon, "is an ultimate legal principle. We may say, indeed, that it is recognized by precedent, and has there its legal source. But it may be said with equal truth that the authority of precedent is recognized by, and has its source in, custom. One or other of these two propositions may be true, but to accept them both is to reason in a circle."<sup>3</sup> "These two are co-ordinate legal sources, and each operates independently of the other. Custom does not rule the law through precedent, any more than precedent through custom."<sup>4</sup>

The  
answer.

605. The answer to objections of this kind appears to me to be that the people are not, what the judges are, an official organ. It seems to me not only possible, but highly important, to distinguish between what the judges do or may do, and what unorganized and unofficial groups within the community do or may do. It appears to me a right and important step in the direction of a sound theory to hold that popular custom enters the law, if not through precedent, at least through judicial practice; that precedent also becomes law by virtue of judicial practice, and that in consequence the authority of both popular custom and isolated precedent find a common basis in the authority of judicial practice. In the view I hold of the matter, we have reached a stage in our legal history when a theory of customary law inevitably leads on to a theory of judicial practice in general. Some suggestions towards the latter theory have been already made in the preceding excursus.

<sup>1</sup> "Political Science Quarterly," IX, 47.

<sup>2</sup> "Nature of the State," p. 175.

<sup>3</sup> "Jurisprudence," p. 110.

<sup>4</sup> *Ib.*, p. 155.

## EXCURSUS E

### A CONSIDERATION OF SOME OBJECTIONS TO THE CONCEPTION OF POSITIVE LAW AS STATE COM- MAND

610. AUSTIN defined a law as a species of command. The definition was not original; it had been expressed by greater men, forming indeed a venerable juristic succession, and enjoying for centuries the sanctity of orthodoxy. Never without rivals, however, the definition has been subjected in our own time to a searching and vehement criticism. The historian has declared it unhistorical, the lawyer impractical, the philosopher superficial. Before such criticism, the definition might have been expected to apologize for taking so unconscionable a time in dying. Its disappointment of such expectations may serve to recall to the mind of hostile criticism a remark of Leslie Stephen that philosophical theories live long after their brains have been knocked out. We have here, it may be suggested, an illustration of the fatality of hereditary attachment. Just so, those who believed the earth to be flat have left such a taint of that impression in the blood of their descendants that some may still be heard to confess in half-shamed whisper, "I think something may be said for a flat earth after all!" "What," I have heard one demand, "What if there be a Hell after all!"

611. Although the modern believer in Austinian or Neo-Austinian doctrine who lives on this side of the Channel finds aiders and abettors in high life, he cannot be insensible to the

Modern criticism of Austinian definition.

Not an unmixed evil.

growing body of criticism which he is called upon to answer. Under these circumstances it may be a consolation for him to reflect that truth can only be won through controversy, that only by refuting error can we hope to realize what the true may be. The present conflict as to the meaning of law should be welcomed as the student's opportunity to win his spurs. If knowledge rather than formulæ be his goal, his lot is happier than that of the student who is born in a period when all are agreed as to what is true, while scarce any one realizes the nature of that as to which all are agreed. Certainly the student who carefully examines the objections to the conception of law as command, the reasons which may be urged for them, and the answers that can be suggested to them, will gain a new insight into the meaning of law. If the reader has not already approached the subject from this point of view, he may find some material for consideration in the following excursus. The position under examination, however, is not identical with that adopted by Austin, who defined a *law* not *law*, and looked for the source of laws, not to the State, but to the visible ruler. With respect to the last-mentioned difference, my reasons for dissenting from Austin have been stated in the excursus on the State and Sovereignty. My preference for discussing the definition of *law* rather than of *a law* is the result of a conviction that for the purposes of legal science it is more important to arrive at a general conception of one's subject-matter as a whole than to obtain a verbally precise definition of the fragments of which it is composed.

Objections 612. The objections to which attention is drawn may be  
stated. briefly stated:—

A. As to the Source of Law.

- (i.) Law is older than the State.
- (ii.) Customs are laws apart from State recognition.
- (iii.) Law, not the State, is supreme.

B. As to the Nature of Law.

(iv.) A great part of law is not expressible as command.

(v.) Even where law is so expressible, command is not of its essence.

(vi.) In any case, the representation of law as command is hopelessly inadequate.

This list is not suggested as exhaustive, or as representing the tenets of any one school, but as convenient for the purposes of discussion.

613. (i.) *Law is older than the State.*—In a recent work, (i.) Law older than State. “The Native Tribes of South-east Australia,” Dr. Howitt has shown that tribal laws or customs are obeyed by the Australian aboriginal, not from any fear of punishment by tribal authority, whether individual or collective, but from the dread of a supernatural punishment in whose reality the individual has been taught to believe from infancy. The evidences of similar phenomena elsewhere might be multiplied indefinitely. On the authority of such evidences, three distinct arguments may be suggested. The conception of law as State command is not applicable in the earlier stages of social life; as a consequence it is not likely to represent the true inwardness of things to-day; and in any case a definition of law, to be scientific, should embrace its meaning in the different stages of human history.

614. The consideration of such arguments belongs to a Its incon- science or philosophy of legal history rather than to a theory clusive- of the modern law. In this connection, two conceptions of ness. the purpose of historical study require to be distinguished. We may study the history of the past to illumine the present; or we may study that history for its own sake. In the one case history is an accessory study; in the other case it is an independent science. The former is the point of view which appeals to the theorist of things as they are. In constructing

a science of law as it is to-day, recourse may be had to history for suggestion, but not for final judgment. When, however, it is once clearly realized that there may be different sciences of law, each entitled to have its own definition of its subject-matter, the present objection to the conception of law as State command loses its force. The fact that the conception is only possible in a modern atmosphere, so far from being a criticism, is on the contrary a eulogy if our object is a science of the modern law. The historical-mindedness which should save us from the error of fastening a modern conception upon ancient fact, should also save us from the like error of forcing on modern fact a theory derived from, or suggested by, ancient data. Each generation, as I remarked in the preceding excursus, lies under the eternal necessity to give its own account of things or rest a defaulter. "There may have been a time in the far past when a man was not distinguished from an anthropoid ape, but that is no reason for now defining a man in such wise as to include an ape."<sup>1</sup> So, too, in the life of our time, there is such a thing as State-enforced rule—a reality of profound importance and wholly worthy of being made the subject of a distinct science. The circumstance that the historical antecedent of this reality may have been enforced by an impersonal authority or a supernatural sanction, is interesting but inconclusive. For the jurist, who is concerned to achieve a theory of modern law, law implies a State and an organized ruling power within it.

(ii.) Customary law,

615. (ii.) *A great part of the modern law has been derived from popular customs which have been held to be laws before being adopted by the State, and independently of such adoption.*  
 + *The State enforces them because they are law; they are not law because the State enforces them.*

In reality State commanded.

616. If it were true that law could be made by unorganized masses of the population, the conception of law as State

command would be open to serious objection, since the term State stands for the organized community. That the unorganized masses of the population have no such power is a position I hope to have sufficiently demonstrated, at any rate so far as England is concerned, in the preceding excursus. In the opinion I have there upheld, the very small section of popular customs which can lay any claim to be called law, are law by the specific or general adoption of the judges. Such adoption is quite as much the work of the organized community as a general legislative adoption. It is true that the State enforces them because they are laws; but they are laws because they are declared to be so, specifically or generally, by the judicial organ.

617. (iii.) *Law, not the State, is supreme.*—"How is the enforcement of the law regulated? By the law itself. The force is exercised, in fact, according to law. Even when its exercise seems to be most arbitrary, there must be some legal method behind it. It is the law, then, and not the force which is supreme. . . . The law by which the ruler rules cannot be the outcome of his ruling."<sup>1</sup> The force of arguments of this kind is less directed against the conception of law as command of the State, than against the conception of law as command of a visible ruler. Austin, failing to recognize that both rulers and subjects are parts of a larger unity, attributed the origin and authority of all law to the former. The position is not, in my opinion, maintainable; nor is it under consideration in the present excursus.

618. But even when we reject the error of identifying the State with the visible rulers, the criticism that law not the State is supreme may be urged in either of two senses. According to the first of these senses, law exists independently of its formulation by the State; for example, as a

(iii.) Law not force supreme.

Objection maintainable against Austinian theory.

The objection in senses: (a) that law exists independently of the State;

<sup>1</sup> Watt, "Legal Philosophy," p. 18.

philosophic *lex nature*, or as a body of rules deriving their being from the very nature of things.<sup>1</sup> The criticism, though it may have a meaning for the purposes of a philosophy of law, is irrelevant for the purposes of that science of law of which the lawyer stands most in need. Such a science must recognize, as its raw material, the legal rules which actually exist. But the legal rules which actually exist are determined by reference to State-declared will. As philosophers, we may believe in the existence of ideal codes; as lawyers, we have to reckon with the fact that the degree of mutual adjustment which is to be enforced in a society by the corporate will, must be determined by that will. Law only becomes actual as it is officially declared by the State and enforced by its authority.

(b) that  
the State  
is limited  
by law.

619. The criticism that law not the State is supreme, may be based, however, upon the fact that the State is bound by law. The existence of a State, as we understand the term to-day, implies not merely rule, but rule according to law. But although the State may be bound by law, it can change that law at will, and hence in a very real sense is superior to it. The supremacy in developed States is even expressed in the visible organization. Most States possess some organ, or group of organs, which is supreme over law, not in the sense that it can *violate* law at will, but in the sense that it can *change* the law at will. The position has been challenged at times with regard to the rules of fundamental Constitutional Law. The fifth section of the Constitution of the United States, for example, defines the organization by which amendments of the Constitution may be effected; the section is a law of which the Supreme Court will take cognizance; the organization which it prescribes is sovereign; and accordingly that sovereign, when it makes new law, does so in the name,

and by the authority, of law. Nevertheless, the ultimate supremacy of the State is sufficiently demonstrated by the fact that, when once the sovereign organization is in being, it can change at will the very law to which it owes its origin and authority. Rightly regarded, the fifth section of the American Constitution is not superior to the State or sovereign; it merely defines the sovereign organ. It is simply an expression of the will of the State, prescribing its mode of action for certain purposes.

620. (iv.) *A great part of law is not expressible in the form (iv.) Some of command.*—Austin admitted the non-imperative character of laws explaining or repealing positive law, and of laws of imperfect obligation. Later criticism of Austin's general position has been more especially directed to two other classes. In the first place, many rules of law affect not to impose duties, but to confer privileges. Thus a Settled Land Act empowers a tenant for life to exercise new rights of alienation; a Companies Act allows any seven persons, who choose to go through certain formalities, to enjoy the privileges of incorporation; and an Enfranchisement Act confers the suffrage upon a new class of the population. In the second place, such rules of procedure as relate to the admissibility of different kinds of evidence, or define the respective provinces of judge and jury, seem neither to impose duties nor to confer privileges, but simply to state the conditions under which Courts of Justice will apply legal sanctions.

621. Two answers have been made with respect to such classes. It may be said of them that they involve a real imperative, i.e. the command to the judge.<sup>1</sup> Apart from the obvious fact that the supreme lawgiver may also be the supreme judge, and so not amenable to legal penalties, the answer is open to the objection of evading the primary

<sup>1</sup> Cf. Ihering, "L'Evolution du droit," § 149.



(b) The  
term *a*  
*law* too  
narrowly  
inter-  
preted.

aspect of legal rules for an aspect which is secondary. An answer which is more entitled to respect dwells upon what is alleged to be an undue abstraction in determining what are legal rules. "A law, like any other command, must be expressed in words, and will require the use of the usual aids to expression. The gist of it may be expressed in a sentence which, standing by itself, is not intelligible; other sentences locally separate from the principal one may contain the exceptions and the modifications and the interpretations to which that is subject. In no one of these taken by itself, but in the substance of them all taken together, is the true law, in Austin's sense, to be found. Thus the rule that every will must be in writing is a mere fragment—only the limb of a law. It belongs to the rule which fixes the rights of devisees or legatees under a will. That rule, in whatever form it may be expressed, is, without any straining of language, a command of the legislator. That 'every person named by a testator in his last will and testament shall be entitled to the property thereby given to him' is surely a command creating rights and duties. After testament add 'expressed in writing'; it is still a command. Add further, 'provided he be not one of the witnesses to the will' and the command, with its product of rights and duties, is still there. Each of the additions limits the operation of the command stated imperatively in the first sentence."<sup>1</sup> Other illustrations in support of the same line of argument might be multiplied indefinitely. Mr. Bryce, in his criticism of the Austinian position, refers to Administrative Statutes which enable a public body to do something which it could not otherwise have done. But a Statute empowering Borough Councils to impose a new rate is also a command to the subjects to pay the rate when called upon to do so. The

Statute expresses a permission; it implies a command. Though nominally addressed to the County Council, it is really also addressed to the subject, as he will discover to his cost if he should dispute the payment of the rate. It may be regarded as a delegation by a sovereign body of a limited power of taxation; it may also be regarded as the imposition of a conditional duty upon the subject.

622. Unfortunately, Austin himself was not free from the charge of undue abstraction in determining what are legal rules. Statutes which interpret pro-existing Statutes are but detached parts of a whole along with which they must be read if their true character is to be determined. A similar argument seems to hold with respect to repealing Statutes. One Statute prohibits gambling, and a later Statute repeals the prohibition. What are we to say in such a case? That it is a rule of law that gambling is permissible? If so, we imply a direct command to the subjects not to interfere with the gambler. The theory of English law, however, would be better expressed by saying that there was, but is no longer, a rule of law with regard to gambling. If, subsequent to the repeal of the Statute prohibiting gambling, certain persons choose to gamble and others interfere with them, this interference will not be taken cognizance of by the Courts by virtue of the repealing Statute, but by virtue of the general rules of law which forbid assault, imprisonment, etc. "I take the effect of repealing a Statute to be," said Tindall, C.J., "to obliterate it from the records of Parliament as completely as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded while it was existing law."<sup>1</sup> By reading the repealing Statute along with the Statute repealed,

Austin on  
Declaratory and  
Repealing  
Statutes.

we arrive at the general result, not of non-imperative law, but of the non-existence of law.

(c) Distinction between law and laws.

623. The objection that many rules of law are not expressible in the form of command may be therefore met, in part at least, by the answer that the expression legal rules can be construed, and ought to be construed, in a wide sense. In the present excursus, however, I have elected to consider, not the definition of legal rules, but the definition of law. Now the position that law in its totality is essentially a system of social regulation which the State will uphold by force, is not affected by the fact that some parts of the law are not imperative, if it be true that such parts derive a practical meaning and value from parts which *are* imperative. I referred, in expanding the general objection now under consideration, to two classes of legal rules—rules conferring privileges and rules of procedure. The latter are obviously accessory. They define the legal sanction or express the persons by whom, and the conditions under which, it will be applied. To regard them severally as imperative is to miss their most obvious aspect; it is otherwise when we regard them in conjunction with the totality of the legal system. The same holds good of laws conferring privileges. Such privileges would be meaningless, divorced from their context of State-enforced regulation. A Companies Act, for example, allows any seven persons to incorporate under certain conditions and for certain purposes. The effect is merely to supply official recognition of a new class of person. Law is command to persons; the Act in question offers a general definition of a class of person. Similarly, an enfranchising Statute defines the mode of the constitution of the legislative organ whose chief business it is to formulate new rules of law.

(v.) Command not

624 (v.) *Even though law be expressible in the form of command, command is not of its essence.*—The objection raises

directly an issue indirectly suggested by objections already considered. Admit, it may be said, that we are only concerned with the positive law of a modern State, admit that customs are not law save by virtue of the will of the State, admit that law is not superior to the State, admit that law in its totality can be expressed in the formula of command, we have yet to consider whether, when so expressed, it is most naturally and properly expressed, whether its real essence be not something other than command. The general object of law, it may be urged, is not to impose duties, but to confer rights; not to make the citizen a slave, but to ennoble him as a man; not to compel him to walk in prescribed ways, but to provide him with opportunities for self-realization. Law, in a word, is primarily and emphatically a system of rights conferred in the interest of a common good. If it imposes duties, it is not for their own sake, but only for the purpose of securing rights. Therefore to define the totality as command is to mistake the secondary aspect of law for the primary aspect. "An examination of the current reports of the decisions of Courts of last resort will show that a great number of even common law cases are decided upon principles of utility. . . . What will work best? is an implied question. This is not the jurisprudence of a system of commands; it is the jurisprudence of a common welfare wrought out by free reasoning upon the actual facts of life."<sup>1</sup> "Law, in its own notion," declared Locke, "is not so much the limitation as the direction of a free and intelligent agent to his proper interest, and prescribes no further than is for the general good of those under the law . . . so that, however it may be mistaken, the end of the law is, not to abolish or restrain, but to preserve or enlarge freedom."<sup>2</sup>

<sup>1</sup> "American Law Review," Nov., Dec., 1893, p. 802.

<sup>2</sup> "Of Civil Government," i. 57

General position of present exorcisms stated. 625. With much of this criticism I am in entire accord. That law is a great deal more than command is indeed a proposition which no one will care to combat. I will even agree that command is not the most essential aspect of law, though it may be the most obvious. I hold, however, that rights are nothing apart from duties, that legal duties imply the command of the State, and that in the present constitution of society any definition of law which does not give prominence to the element of command can afford no adequate starting-point for a legal science.

Untenability of Austinian interpretation: (a) of the source of the command; 626. The argument so stated would call for little support but for the fact that the conception of law as command has been interpreted at times in a manner so extreme and one-sided as to create in many minds an unreasoning horror of the very term. Apart from the attempt to force every legal rule into the formula of command which has been already made the subject of reference, a mistake has been made as to the ultimate source of those commands which have the authority of law, and the notion of command has been limited to injunctions which are obeyed through fear of a penalty. For the perpetuation of both these errors, Austin was largely responsible. In regarding laws as the command of the rulers to the subjects, he gave countenance to the inference that law is the arbitrary creation of the rulers. The position at present under consideration, however, is that of law as command of the State, a totality embracing rulers and ruled. As a citizen, a man is not entitled to regard law as an arbitrary regulation of his life when it is the regulation imposed by a totality of which he himself forms a part. The truth of this statement is apt to be forgotten by subjects labouring under the sense of some legislative or executive wrong. Finding themselves in direct conflict with law on one point in a thousand, they concentrate all thought upon that point, and declare that law is none of their doing.

Some excuse for this illogical attitude will always exist as long as the organs for the expression of the general will are so defective as to admit of much being done in the name of the State which is contrary to the will and interests of the State. But even under existing conditions, law, as a system, exists by virtue of the will of that totality of which each citizen is a part—a totality with a past and a future—a totality into which he enters and from which he departs, but of which he is here and now a visible member—a totality which lives and learns, affirming for men's guidance from generation to generation new rules which express the conditions under which man's life may be lived.

627. Austin was also guilty of unduly limiting the notion of command. He regarded a command as an injunction to which a penalty was attached. When, however, he discussed the question of the motives which account for submission to government, he attached most importance to the popular perception of the utility of government. The inconsistency is apparent; it should have been avoided by a revision of his definition of command. Such a revision would have been justified by popular usage, in accordance with which the term as directly connotes the idea of authority as that of sanction. In such expressions as the *royal command*, the idea of authority is the more obvious of the two. The spirit which breathes in the text, "Thy will, not mine, be done," is one of submission to command wherein the idea of authority is supreme, whilst that of sanction is virtually absent. I see no reason why a citizen who defines law as a command should be taken to postulate a reluctance on his part to obey it, still less a reluctance only to be overcome by fear of a legal penalty. In the "English Historical Dictionary," the following is given as the leading definition of command: "To order, enjoin, bid, with authority or influence." The essence of command consists in the fact that it is imposed by a

(b) of the  
nature of  
the com-  
mand.

body which speaks with authority and can somehow or other punish disobedience, not in the fact of its being obeyed through fear of a penalty. To some citizens, law may appear as fulfilment; to others a hindrance; some may revere, others may hate it; alike to saint and to sinner it speaks with the authority and sanction of the State. Whatever may be the motive of the citizen's obedience, the law is still law to him, still a command to him, although all thought of the legal sanction lies entirely in the unexplored recesses of his consciousness.

Neo-Aus-  
tinian in-  
terpreta-  
tion of  
command.

628. When once the conception of law as command is clearly distinguished from the representation of legal rules as the arbitrary creation of a visible ruler obeyed by subjects from fear of legal penalties, it is difficult to see on what ground the conception can be criticized. Whatever else law is, it is at least command. What makes a particular rule of conduct law, is not the fact that it may be useful, but that behind it is the majesty, the authority, and the force of the State. There are other rules of conduct which men observe under the influence of all kinds of impulse, but of the rules of conduct which are law, the distinguishing characteristic is the existence of the organized force of the community behind them. But what the community as an organized unit will enforce, it may be said with justice to command. Law, in its totality, is the voice of the organized community speaking to all persons subject to its control, and affirming a rule of life which men may accept with the consciousness of the might of the community to support them. It is the expression of the organized will of the community, backed by the organized force of the community. Particular rules of law may not be expressible in the imperative form, but such rules derive their meaning and value from their association with a system which, regarded as a whole, must be held to be commanded—if once the term command be do-

fined in the manner which popular usage and common sense require.

620. (vi.) *The conception of law as command is inadequate* (vi.) Law <sup>more than</sup> ~~command.~~ *for the purposes of Legal Science.*—The proposition that law is more than command will receive the assent of all classes of the community. But when we come to determine how far this something more is so essential to the nature of law as to call for expression in its definition, important differences of opinion are certain to arise even amongst that very limited class of folk who are interested in legal science. One reason for such differences may be found in the fact that legal science may be approached from very different points of view, and may be pursued with very different objects. Austin affected a Jurisprudence which should serve the purposes of an introduction to the study of a particular legal system. It may be urged with much force that, for such purposes, Austin's definition was not seriously inadequate. Among those who are interested in legal education to-day, however, there are some who demand a theory of law which will serve more ambitious purposes—a theory which will complete an academic course of legal study rather than serve as an introduction to it—a theory which, whether it be mainly history, science, or philosophy, shall give to the student of law a new interpretation of his subject as a whole. For such a theory of law as this, we must go much further in our definition of law than to characterize it as command.

630. I shall venture, in concluding this excursus, to express my own opinion as to how much further we ought to go. In two respects at least, there need be little fear of evoking criticism. In the first place, law affirms rules of conduct. The command of the State, in the nature of things, cannot be directed to particular individuals or particular occasions. Accordingly, it regards persons and occasions gener-

Law con-  
stituted of  
rules of  
external  
action.



ally. In the second place, since the law must be enforced, the command of the State must not invade a domain where enforcement is wholly impossible. One such domain is so obvious and important as to call for express mention. Law can compel men to *act* justly, not to *think* justly. In other words, law relates solely to external action. Austin included the first of these essentials in the definition of a law, but not the second. Professor Holland includes both. "A law is a general rule of external human action enforced by a sovereign political authority."<sup>1</sup>

Further  
elements  
in law.

631. If we are to define law, as distinguished from rules of law, the foregoing analysis only expresses the results of what may be called a first view. In such familiar descriptions of law as the empire of the dead over the living, as the product of national life, as a spirit which lives and moves within the letter, we may recognize dimly the presentation of great truths which should be reflected in the definition of law. I will venture, accordingly, to urge for the inclusion of three further elements in the conception of law in addition to those to which reference has been made. The sum of the rules which go to make law is a *unity*; it is a unity which is also a *growth*; it is a growth which is also something distinguishable from a mere natural product, being in fact an expression of human intelligence and design—"a growth directed by conscious foresight."

(1) Law a  
unity.

632. (1) *Law is a unity*.—Particular rules of law cannot be interpreted as if they were detachable fragments of an atomic or mechanical whole. To explain their meaning we must regard them alongside of other rules of law which qualify or extend their scope and regulate their enforcement. In the last analysis, every rule of law takes its meaning from the totality of law, and legal science should aim at giving to

the student such an appreciation of that totality as will enable him to realize the inner significance of particular rules.

633. (2) *Law is a growth*.—The truth must be interpreted (2) *Law a growth*. in a sense deeper than that understood by Austin. "The Constitution," he wrote, "has grown. . . . I intend to intimate by the phrase that the constitution of the supreme government has not been determined at once, or agreeably to a scheme or plan: that positive moral rules of successive generations of the community (and, perhaps, positive laws made by its successive sovereigns) have determined the constitution, with more or less of exactness, slowly and unsystematically." Growth, in other words, implies no more than slow and unsystematic manufacture. To the student of today, the inadequacy of such a purely negative conception of growth will be apparent. We may patch a cloak, we may add to it or alter it, but we cannot make it grow; the patches, additions, alterations remain the same in essence; they enter into no vital relation with that to which they become related. Quite different is the case of change in law. Existing rules of law change in their meaning from age to age by slow, insensible processes, and additions or alterations of the law are no more patchwork. The most despotic of legislators cannot think or act without availing himself of the spirit of his race and time. His most despotic laws reveal the influence and potency of that spirit. When they are once promulgated they have to be interpreted and administered; in the process of interpretation and administration, the spirit of the legal system as a whole will reassert itself at every stage; between the rule and the legal system vital relations become established; and if we are to describe the change in the legal system we must call it a growth, not in the mechanical sense conceived by Austin, but in the living sense in which we employ the term when describing

the developmental processes which are characteristic of organic nature.

Import-  
ance of  
legal  
history.

634. The fact that law has grown is a commonplace of which the importance is seldom realized. Some general idea of this importance may be gained by reflecting for a moment upon the revolution effected in the nineteenth century, in the world of thought in general, by the discovery that what has grown needs to be studied in relation to the processes of its development. The historical spirit of inquiry achieved its supreme triumphs in natural science, but invaded many domains and assumed various forms. It reformed theology, revolutionized philology, and created sociology. When in literary criticism Sainte-Beuve laid down that each literary work was a mental result which could only be understood after a study of the character, ancestry, race, country, and intellectual, moral, and social surroundings of the individual who produced it, he was but once more illustrating the modern belief that a product cannot be fully understood apart from the factors, an effect apart from the cause, the present apart from the past. The same belief has invaded the domain of law. Here too we have learnt that the present is an outcome of compromises which the past alone can explain; that if we are to understand law, we must study the processes of its development as well as the forms in which it expresses itself to-day. To Savigny belongs the honour of establishing the profound truth of this view by the irresistible logic of example. In his epoch-making treatise on Possession, he showed how much of the later Roman law is unintelligible without the aid which historical inquiry affords. In our own day, happily, we need not go to German texts to learn the power of the new method. In various treatises on the modern law, we are enabled to see how closely the origin and history of legal rules bears upon their meaning for the modern lawyer. In the great work of Pollock and Maitland

we may experience, in the studies of our early law, the revelation of a new meaning in our whole legal system.

635. (3) Finally, the law which is at once a unity and a (3) Law's growth, is moreover a growth of a special kind, since it is <sup>purpose,</sup> directed and guided by the forethought of man in view of purposes deemed to be good. If legal development is a process which must be described according to the categories of growth rather than those of manufacture, this growth is not the outcome of blind forces, but is in a large and ever increasing measure the expression of human initiative and design. The fact, though more obvious where legal development takes place through acts of formal legislation, is easily discernible in the sphere of customary law. A usage may grow imperceptibly; it takes its origin in the thought of men conscious of an end to be attained. The process is aptly compared by Ihoring to the formation of a path through a virgin forest. The path was not created by the obscure instinct of the masses, but by the conscious will of the pioneers after whom the crowd followed.<sup>1</sup> And the transformation of usage into law has demanded the reflective action of judges and lawyers, under whatever title they may be recognized in the different stages of social evolution, who have assisted in the work of selection, formulation, and definition. "The pretended obscure forces of nature," declares M. Lambert, "which are alleged to play with regard to the elaboration of custom the rôle which is played as regards statute law by human reason, are only the resultant of all the initiatives, all the efforts of reflection and invention, of the mental energies of innumerable practitioners who stimulate and direct the development of our legal thought."<sup>2</sup>

636. I wish to dwell for a moment upon the purposive element in law, because I hold strongly that no science of <sup>Import-</sup> <sup>ance of</sup> <sup>recogniz-</sup> <sup>ing</sup>

<sup>1</sup> "Histoire du droit."

<sup>2</sup> "Études du Droit commun et législatif."

purpose  
element in  
law.

law can be adequate which ignores the ends which law serves. If law is an imposition from above, it is also a rule of existence which the State has indicated as a means by which varying interests and opinions may be reconciled, conflicts avoided, and the general well-being promoted. While the conception of law as a growth should save us from the common fallacy of supposing that law is the creature of an individual ruler dispassionately calculating, in a more or less detached or Machiavellian manner, the best means for promoting any particular ends he may have in view, the conception of law as realizing a purpose should guard us against the opposite fallacy of looking upon legal development as the spontaneous outcome of a national instinct which constructs a system "as bees construct honeycomb without undergoing the degradation of knowing what they are doing." To regard the legislator as acting independently of the popular mind is one fallacy; to regard his work as the unreflecting expression of that mind is another fallacy. The legislator may be looked upon as the organ of the national will; but if so, then as an organ which not merely expresses the national will, but to some degree, and within certain limits, thinks for it. While one school of law has exaggerated the conscious element in legal evolution, another school has exaggerated the unconscious element. A complete theory of law must embrace both.

Resulting  
conception  
of law  
as an  
organism.

637. If the preceding argument is sound, a just conception of law implies the recognition of the elements of unity, of growth, and of growth consciously directed in view of an end to be gained. If we wish our definition of law to express these elements, we may borrow from the thought of our time the conception of the organism. The conception, originally suggested by biological analogies, has proved widely useful in the sciences concerned with human nature. Most students are familiar with the use which has been

made of the conception in the sphere of Political Philosophy, where men have turned from atomistic or mechanical theories of the State to the theory of it as a living whole.<sup>1</sup> The conception will be found not less useful as an instrument of thought in the work of defining law. It resumes, sufficiently for the purpose of a definition, the elements upon the importance of which I have been insisting. In describing the totality of the law as an organism we imply at once that it is a unity, a growth, and a growth which must be studied from the point of view of function as well as from that of structure. We imply that the rules of which it is constituted are not related to it as a part of a machine to the whole machine, or as a single stone to a heap of stones, but as part of a living plant to the whole plant. We imply, i.e., that the relationship is intrinsic, not extrinsic, that into each rule of law the spirit of the whole law enters. We imply also that changes in the law are not comparable with the additions of coins to a heap of coins, or the modifications of a mechanism, however elaborate, but to the growth of an organic nature—a growth involving a constant adaptation of the new to the nature of the old. Finally, we imply that law, like every other organism, must be regarded from the point of view of function as well as from that of structure—from the point of view of physiology as well as that of anatomy.

638. The conception of law as an organism has been already suggested by learned authors, among others by Ihering in his great work on Roman Law. As that work is little read in England, I will venture to present a brief outline of Ihering's doctrine so far as it relates to the subject immediately under consideration.<sup>2</sup> The author begins by remarking that the recognized rules of law are but the aspects which

Ihering's  
theory of  
law.

<sup>1</sup> Cf. *supra*, Excursus B.

<sup>2</sup> Cf. "Esprit du droit romain," I, 27, 50.

the observer realizes on a first view. They convey no adequate idea of the law, since even in the case of a system which has been expounded by lawyers of the greatest genius, a distinction is certain to exist between rules of law which are expressed and those which are latent. The latter may be applied by lawyers who have no consciousness of them, just as a man may observe rules of grammar which his mind has never expressly formulated. So a primitive code of law is no more than a few fragments of a vast unrealized whole. Even when men come to recognize the rule of law which they have once unconsciously applied, they experience the greatest difficulty in giving to it an adequate expression. As that expression is never quite perfect, a divorce between the real law and the formulated law is inevitable. If men would understand the nature of the real law, they must pass from the group of particular rules of law which establish the juridical form of a specific relation of life, to other related groups of legal rules, until they reach the systematic unities of which those rules are but an expression. For example, they must pass from the conception of the contract of sale to that of contract, and again to that of obligation. Legal rules, legal relations, and legal institutions are thus but successive stages in a series of generalizations by means of which the lawyer passes from the formulated law to the real law. An infinite multiplicity of legal rules, which to the layman may seem the natural destination of a legal system, must appear to the lawyer an evidence of feeble digestive power on the part of those who are concerned in its administration. If we carry the process of analysis one step further, we discover at every epoch in the history of a legal system the existence of certain dominating influences—the time-spirit of a people. Law, far from being a mere aggregate of legal institutions, possesses a unity and an individuality related to appearances

as the soul to the body. To reveal this psychic element in the law is the supreme triumph of legal science. It is a triumph which implies *inter alia* the fact that in law, as in other organisms, we need to know the function if we would comprehend the organ. Nothing exists in law, save through, and in view of, the end. How important is this truth we may appreciate when we reflect that a legal system may be perfect as a work of art and yet useless as a social force; or by reflecting that the excessive attention to the anatomic structure of law tells for legal classifications in which the inner meaning of rules is sacrificed to their form.<sup>1</sup> Or yet again, by reflecting how treatises on the history of Roman Law, by regarding solely the history of the dogmatic content of the law without reference to the actual conditions of existence at the different periods, has often ended in presenting to the student a mere caricature of the reality. In the opinion of Thoring, the history of Roman Law would have made greater progress if it had received more attention from the historian by profession. "J'ai fait de bonne heure cette expérience avec la courte esquisse de l'histoire du droit romain qui se trouve au chapitre XLIV. de Gibbon. J'ai été cependant quelque temps avant de me rendre compte du motif pour laquelle elle exerçait sur moi une attraction infiniment supérieure à celle que les travaux bien plus étendus, publiés jusqu'alors par les jurisconsultes, avaient produite sur mon esprit. Gibbon est le premier qui ait offert à mes yeux un tout, très concis il est vrai, mais concordant et plein de vie, tandis que je n'ai trouvé dans tous les autres auteurs que des lambeaux et des fragments de règles, de lois, etc."<sup>2</sup>

<sup>1</sup> I presume that a classification of English Law which would treat the right *in personam* of a *cestui que trust* as part of the law of obligation rather than of property would be regarded by Thoring as an illustration of this error.

<sup>2</sup> "Esprit du droit romain," I, 57 n.



The definition of law.

639. If the general argument of the present excursus be sound, a science of law should venture a definition of law in its totality. That definition should recognize the imperative element in law, and also certain other elements which found little or no expression in Austinian analysis. In accordance with this view, I hold that it is not wholly relevant to ask whether law is will or command or reason, since it is all three. It is an expression of the general will, affirming an order which will be enforced by the organized might of the State, and directed to the realization of some real or imagined good. Mediæval schoolmen might argue that the essence of the Law of Nature was reason, and "that there would be a Law of Nature discoverable by human reason and absolutely binding, even if there were no God."<sup>1</sup> Such a dictum cannot be extended to positive law. If there were no organized State to enforce rules of conduct, there would be no such thing as positive law, though there might be a something which was on the way to become positive law, if the community in which such rules were observed might be said to be on its way to becoming a State. Law, as the term must be interpreted in legal science, is the organic totality of the rules relating to external human action, together with the associated systems of rights and duties which those rules imply, affirmed by the State through official organs, maintained by the organized power of the State, and applied by the Courts of the State in the discharge of their judicial functions.

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<sup>1</sup> Gierke : "Political Theories of the Middle Age," p. 174.

## EXCURSUS F

### THE SCIENCES OF STATE LAW

640. Law has been described as an organic totality of the rules of external human action, and of the associated system of rights and obligations which those rules imply. This totality may be studied with special reference, either to particular rules, rights and duties, or to underlying principles, fundamental conceptions and historical causes. In the former case, we may be interested either in a present content (legal exposition), or in the past development of that content (legal history). In the latter case, we enter the domain of legal science.

641. The distinction between law as a body of rules and law as a body of principles cannot be drawn with absolute precision. An author of a text-book on the Law of Contracts, for example, is inevitably impelled at times to deal with fundamentals, in the mere endeavour to state adequately and clearly the rules of his subject. Nay, every law student who seeks to find the general in the particular is so far a scientist. Every judgment of a court which directly assists him in doing so, is a contribution to legal science. This does not mean, however, that legal science has no existence apart from legal exposition or legal history. "I take my jurisprudence," I have heard one student say, "from the Law Reports." The statement suggests courage rather than wisdom. The judgments of the Law Courts are delivered in the consciousness that they may become precedents for future cases. As a result, they are expressed in terms which

limit their significance to particular rules. The judges rarely venture into that region of the more general and the more abstract with which the student of legal science is concerned. The student, on the other hand, while he is not restrained by the terrifying fear which limits the word, if not the thought, of the judge, has perhaps other reasons for refusing to venture where the judge has feared to tread. While, throughout his course, he is largely engaged in turning the materials of the Law Reports into scientific form, he can only hope to gain a science of the whole law by this process if he be gifted with an extraordinary industry and a still more extraordinary insight.

The  
sciences of  
the law.

642. Legal science, then, is concerned with principles, conceptions, and causes. It has many branches. It may refer to the causes of legal development, to the principles underlying an existing system, to the principles underlying several systems, or to the principles of an ideal system. The term legal science should embrace all of these, although some authors, in a perhaps excusable zeal for the special science in which they are most interested, would limit the expression to that science and deny it to all others. In the present excursus I propose to distinguish between the several sciences, and to refer briefly to their value for the purposes which a student of law may be supposed to have in view.

Natural  
law.

643. Legal science, as the science of the principles underlying an ideal system of law, has been discussed by a great variety of authors who may be divided into two classes according to the degree in which they have displayed an inclination for metaphysics. Lorimer may be taken as a type of the one; Bentham of the other. The former is the more philosophic; the latter the more practical. The one professed a theory of Natural Law; the other a theory of Legislation. The theorists of Natural Law attempted to construct, by *a priori* methods, an ideal law of which existing systems

were conceived to be very imperfect anticipations. The practical and scientific demerits of the school were closely connected, and have long been commonplaces. Practically, the school threw little light upon the nature of existing law; and the result was largely due to a disposition to build up an ideal system in reliance upon the processes of abstract reasoning from the data of man's social nature, without due regard to the revelation of that nature in history and in existing legal systems. Such a school might afford scope for philosophic genius, but must appear remote from practice. It might help to foretell a remote future; it could not interpret the present. Partly owing to the character of the English temperament, and partly owing to the bias which certain historical conditions imparted to early attempts at legal philosophy in England, the school has exercised a comparatively slight influence upon English thought. It has indeed become a byword for the unreal and the fanciful. Its fundamental merit consisted in its appreciation of the importance of the end of law as a subject of juristic inquiry; its fundamental demerit in its determination of that end by *a priori* analysis. The school serves to recall the luminous censure in the "Advancement of Learning": "As for the philosophers, they make imaginary laws for imaginary commonwealths, and their discourses are as the stars, which give little light, because they are so high."<sup>1</sup>

644. The methods of English jurists, even when they have been idealists, have been more nearly *a posteriori*. Thus Bentham, although nominally guided by reference to abstract considerations of the greatest happiness of the greatest number, was mainly guided in his conceptions of the ends of law, and of the means for attaining those ends, by observation of concrete systems. As a consequence, his ideal civil and

theory of  
legisla-  
tion.

penal code, while it contains much that is highly suggestive to the legislator, serves also to reveal incidentally the true purpose and meaning of existing rules. A law student who reads the famous "Principles of Legislation" will scarcely fail to gain a new insight into the meaning of the actual system which he is to interpret and apply.

Historical  
Jurispru-  
dence.

645. The student of legal science who openly and avowedly leaves the world of the ideal for the world of the actual, may seek for the material of his science either in legal history or in legal exposition. In the former case, he aims at achieving a theory of legal development. His object is, not to formulate a Natural Law, but to discover natural laws.<sup>1</sup> His science might be called Historical Jurisprudence. I have referred, in a previous excursus, to the value of legal history. I shall endeavour to explain here what I conceive to be the distinction between that subject and Historical Jurisprudence. Legal history affects to describe the actual development of the law as it has been at the different periods of the national history. Historical Jurisprudence should state, as far as may be, the moral, social, and economic causes which account for that development. The one answers the question how? the other seeks to find some answer to the question why? The one describes legal development; the other explains it. The one regards the development of the law more or less in isolation; the other is compelled to bring that development into relation with the general progress of the national life. Finally, while both legal history and Historical Jurisprudence help to explain existing law, the light afforded by the former is primarily the result of showing how particular rules or institutions have come to be what they are, whilst the light afforded by the latter is rather the result of an added insight gained

from a broad view of the development of the legal system as a whole.

646. The value of Historical Jurisprudence to the law student will be universally admitted. Unhappily, the subject exists in imagination rather than in fact. So far as Anglo-Saxon Law is concerned, we even lack a complete legal history. Although invaluable contributions towards such a history have been made, and although those contributions have been occasionally marked by a sense of causation, Historical Jurisprudence is still for us a dream of far-off things, a vision of a future that may be, more to be valued as an inspiration in the study of legal history, than as a source of positive information or as a special science of the law. Its value in legal studies.

647. If the material of our science be legal exposition rather than legal history, if we are in search of a theory of modern law rather than a theory of legal development, we are at once confronted by a very debatable question which may be expressed as follows: Ought a theory of modern law to be based on the analysis of *one* legal system, or on the analysis of *several*? Austin, while he distinguishes between Particular and General or Comparative Jurisprudence, is clearly persuaded of the superiority of the latter. But the term Comparative Jurisprudence may be used in at least three distinct senses. In the first sense, the term may indicate a study of which the avowed object is to discover a law common to various nations—a body of legal rules which are alleged to exist in a number of different civilized communities and which, by virtue of this existence, are assumed to possess a permanent value. The idea is that of a *jus gentium*, as that term has been frequently interpreted. Such a system of rules suggests an obvious parallelism to the Law of Nature of *a priori* philosophy. There are, however, two important differences. A *jus gentium* postu- Compara-  
tive Juris-  
prudence.

lates neither immutability nor universality. It may grow with the growth of the different national systems from which it is drawn; and for the test of universality, it substitutes that of generality. In a second sense, Comparative Jurisprudence may be identified with the General Jurisprudence of Austin, i.e. as the science of the notions, principles, and distinctions common to the various systems. This is also the sense of the term Jurisprudence as defined by Professor Holland: "Jurisprudence is not the material science of those portions of the law which various nations have in common, but the formal science of those relations of mankind which are generally recognized as having legal consequences."<sup>1</sup> In a third sense, Comparative Jurisprudence may indicate, not a science of the law in general, but any investigation of a particular legal topic which attempts to show how that topic is dealt with in two or more legal systems. The object of such an investigation may be to discover hints for the reform of law or for the interpretation of law. In the latter case, the particular solutions which are offered by different systems of particular groups of facts are examined together, and their precise relation discussed. In the former case, the further attempt is made to consider the relative merits of the solutions suggested by different systems with the object of discovering that which is most adapted to serve the purposes of a particular *milieu*.

Value of  
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prudence:  
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*Gentium*;

648. What is the value, to the law student, of Comparative Jurisprudence in either of the senses suggested? As a *Jus Gentium*, Comparative Jurisprudence is a subject of speculative rather than practical interest. Even its possibility might be challenged on the ground that the rules of law as formulated in different systems are solutions of particular combinations of fact largely determined by the

<sup>1</sup> "Jurisprudence," 9th ed., p. 8.

circumstances of a particular *milieu*, and distorted when considered abstractly apart from that *milieu*. Even if this objection should be considered inconclusive, the subject is a highly controversial one. Unless the *jus gentium* is to be the mere result of arithmetical processes, the existence of a particular rule in several systems is only one of the circumstances to be taken into consideration in deciding whether it shall be included in the system induced. Among the solutions of particular problems afforded by the different systems, an investigator must make allowance for considerations of quality as well as of quantity; he must examine the claims of a rule less commonly adopted (as opposed to the claims of a rule more commonly adopted) on the grounds of the alleged superiority, either of the rule itself, or of the systems from which it is drawn.

649. The merits of Comparative Jurisprudence in the (2) as  
 senso of an investigation of some legal topic as developed in <sup>compara-</sup>  
 two or more systems, is a subject with regard to which there <sup>live study</sup>  
 exists a strange divorce between modern profession and <sup>of a special</sup>  
 modern practice. While it is eulogized by educational <sup>subject of</sup>  
 theorists, it receives little or no attention in existing <sup>law.</sup>  
 schemes of legal education. Even those schemes which  
 prescribe the study of a foreign law do not appear to  
 contemplate that the study shall be genuinely comparative,  
 either with regard to the whole or a part. In England, for  
 example, although Roman Law is often treated with much  
 thoroughness, it is generally half forgotten before the study  
 of English Law is begun. Learned authors and law teachers  
 may employ the comparative method in the study; it is  
 seldom heard of in the class-room, or seriously practised by  
 the student. If we turn from the schools to the forum,  
 scepticism is more avowed and even ventures to deny the  
 value of the method from any point of view but that of the  
 legislator. "A lawyer," it is urged, "does not know his own



law better for wasting his time on some one else's. Possession of property in Roman law under certain conditions confers certain rights. The fact is interesting, but not specially helpful, to the student of a system in which possession confers other rights under other conditions. The student must know his own law. The knowledge of other laws may be left to legislators who are in search of the ideal."

Value of  
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tained.

650. Despite educational practice and professional plausibilities, the value of a comparative study of a topic of law in two or more systems can be demonstrated by arguments of a most elementary and conclusive character. In law, as elsewhere, an account of the resemblances and differences between two objects is a useful way to bring out their true meaning. Whoever has not made the acquaintance of a foreign language, said Goethe, knows not the first word of his mother tongue. While no one would pretend to apply this dictum within the sphere of law, and declare that a law student who is ignorant of other systems knows nothing of his own, the thought within the speech of Goethe has nevertheless a real meaning for the student of law, as well as for the student of language. Any one who reads the masterly analysis of Possession by Chief Justice Holmes in his work on the Common Law—an analysis in which the Roman theory of possession is contrasted with the English—cannot fail to make a real advance in the direction of understanding both Roman and English law. For it is one of those commonplaces of the truth of which a student needs to be constantly reminded, that the knowledge of a subject of law implies much more than an acquaintance with the mere rules of law which constitute it. Behind the rules which go to the making of our law of Possession, for example, is the conception of Possession itself, which is something distinct from particular rules—something which must be comprehended before those rules can be rightly interpreted—some-

thing which it is within the power of comparative analysis to illumine. Comparative study puts new life into the legal formulæ with which the student will have to deal in everyday life, and thus gives to him a power of vision which must prove of the highest value when he is called upon to deal with new combinations of facts which have not hitherto been made the subject of legislative or judicial interpretation. The argument, both from this point of view and from that of educational discipline, was forcibly expressed by a late Lord Chief Justice. "I have heard many men say, and so far as my opinion is worth anything it is true, that an acquaintance with the Code Napoléon, which is to a great extent founded on Roman law, and a different system from our own, was of great advantage to him (Mr. Benjamin); not only was it of great advantage to him in actual practical argument, because it gave a breadth, and grace, and facility of illustration which might have been wanting otherwise, but it gave him a grasp of larger, wider, more general principles."<sup>1</sup>

651. How then are we to explain the divorce between <sup>Scepticism</sup> modern profession and modern practice to which allusion <sup>on this</sup> has been made? If comparative analysis is capable of <sup>subject</sup> serving purposes so useful, why has so little use been made <sup>explained.</sup> of that analysis in legal studies? One obvious answer may be found in the lack of treatises in which this method has been employed with any degree of success. It was at one time imagined that magical results must follow from a merely tabular arrangement of the legal rules of two or more systems in parallel columns. Hence a faith in the saving power of such works as that of Mackenzie on Roman Law. Comparative analysis only begins to be useful, either as an intellectual discipline or as a source of information,

when the rules of different systems are brought into close and intimate relationship, and the precise differences in their scope and meaning stated and illustrated.

How to  
test value.

652. Fortunately for the student of law, the lack of treatises is no conclusive argument against the inclusion of Comparative Jurisprudence, in the sense immediately under consideration, within the general scheme of his law studies. For, within modest limits, and by the aid of a little guidance from a more experienced hand, he may construct a treatise for himself. He has but to study some special subject, such, for example, as the Law of Sale in Roman and English law, and then, instead of resting content with a superficial enumeration of resemblances and differences, honestly seek to discover how the two systems actually deal with particular combinations of fact. He need not take the trouble to state such combinations for himself, for he will find them already suggested in Ihoring's work on "Law in Daily Life," which has been translated into English by Professor Goudy. If he will conscientiously deal with the practical problems suggested in this most admirable work, not only will the Roman and English Law of Sale be incomparably more real to him, but he will also have gained a priceless experience in the art of bringing concrete groups of facts and legal principles or rules into living relationship.

(3) General  
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653. In neither of the senses just indicated, however, can Comparative Jurisprudence claim to be a Science of Law in the sense in which that science is most needed by the law student. What, then, can be said of Comparative Jurisprudence as the science of the principles, notions, and distinctions common to maturer systems? Apparently not much, unless I have sadly misread some of the lessons the historical school has taught. A system of law is the resultant of many forces, of the particular social and economic conditions, of the character and history of a people. It is a

concrete expression of man's endeavour to realize the useful and the just under the conditions of a particular environment. It varies according to circumstances of time and race. The legal rules of one country are not those of another. But the legal principles which it is the special mission of legal science to state, illumine and develop, are derived from legal rules. If those rules differ in different nationalities, it is difficult to see how the principles can be identical or common. When we have eliminated all differences, the residuum is unlikely to be of much service for explaining or illuminating any of the particular systems which have been made the subject of analysis. The ethos, the spirit of each, has escaped us. "The revived study of Germanic law in Germany, which was just beginning in Austin's day," writes Professor Maitland, "seems to be showing that the scheme of Roman jurisprudence is not the scheme into which English law will run without distortion."<sup>1</sup>

An  
implied  
confusion.

654. The conception of a General Jurisprudence appears to me to imply a confusion between a question of intellectual equipment and a quite distinct question of scientific method. Just as an author who wishes to give some intelligible account of the soul of a people will do well, before undertaking his task, to travel widely both in space and in literature, to reflect on the nature of several races before expounding the character of one, so an author who would express the essence of a particular system of law will do well to begin by availing himself of the discipline implied in the study of a foreign system. In either case, the object is to obtain a breadth of view, a sense of perspective, rather than to discover positive material on which to base the treatment of the subject. The practically minded law student cares little to know that certain principles of his

own system, or something like them, may exist elsewhere. He is interested, not in the universality of a principle, but in the reality of that principle as a representation of rules actually existing in his own system. Conversely, he is not less interested in a principle which possesses this reality, because it happens to be peculiar rather than general.

655. Such considerations appear so obvious that one is at a loss to explain why they should have been ignored, until one remembers that juristic thought has been slow to emancipate itself from the tyranny of a theory of Natural Law. That theory could not long survive the progress of historical methods of inquiry. But investigators were more ready to admit the formal supremacy of such methods than to accept all the consequences of the admission. Hence the disposition to cling to the old fiction of universality in the modified form of generality. The difficulties of this intermediate position are illustrated by a particular concession to the historical school which exponents of General Jurisprudence have been impelled to make. "Jurisprudence," declares Professor Holland, "is a progressive science. Its generalizations must keep pace with the movement of systems of actual law." To which Mr. Buckland has made the very natural rejoinder, "This admission is somewhat startling. A writer on the Jurisprudence of a single nation might make it readily enough. But what is likely to be the fate of a principle found in the law of, say, ten states which go on developing on different lines? The probabilities are against its continuance as a general principle. And the notion that some other general principle will arise to take its place appears to be rather an article of faith than a proposition on which a science can be based."<sup>1</sup>

<sup>1</sup> *Law Quarterly Review*, XXIV, 444, article on "The Difficulties of Abstract Jurisprudence."

656. Happily for the law student, existing treatises on General Jurisprudence reveal a practice which is in advance of profession. The profession of such treatises might lead us to suppose that their authors had laboriously constructed a table of the legal principles existing in different legal systems, and had then selected the principles most generally recognized without any regard to their relative importance under particular conditions. There is little reason to suppose that either Austin or Professor Holland constructed their admirable works on such lines. Comparative analysis has served the purposes of illustration rather than formed the basis of their science.

657. In discussing the terms Historical Jurisprudence and Comparative Jurisprudence, I have made no reference to the fact that the primary method in either of these sciences may be used as an accessory method in the other. Comparative Jurisprudence may involve much historical investigation before we can be quite sure of the nature of the objects we compare; Historical Jurisprudence, while it *might* be based upon the study of materials derived exclusively from the history of a particular country, is more likely to have a permanent value if it takes note of parallel developments elsewhere. "English land law," writes Sir F. Pollock, "cannot be understood at all without a great deal of historical explanation; it cannot be understood very well without learning how peculiar the English history of land tenure was from the Norman Conquest onwards—in other words, without comparing the divergent fortunes of English and Continental Feudalism."<sup>1</sup> But the facts that a work on Comparative Jurisprudence may occasionally employ the historical method, or that a work on Historical

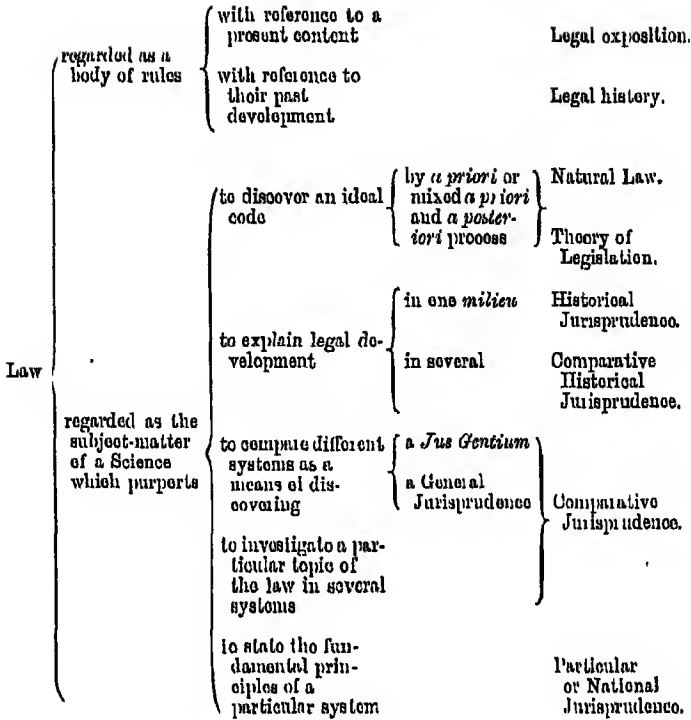
<sup>1</sup> *Journal of Comparative Legislation*, N.S., XI, 78, article on "The History of Comparative Jurisprudence."

Jurisprudence may occasionally resort to comparative analysis for the purposes of illustration or correction, is no justification for confusing the two sciences. The object of Historical Jurisprudence is to trace development; that of Comparative Jurisprudence is to compare two subjects at some particular stage of their development. It would be possible, however, to combine both historical and comparative methods in such a way as to present a comparative theory of legal development. "By the help of God," declared Leibnitz, "I will some day compile a complete panorama of the law wherein shall be arranged in parallel columns the laws of all nations, of all countries, and of all ages." Such a panorama may be conceived as the material of a science which should examine the origin and development of law under various conditions of race and clime. With respect to the possibilities of such a science, Mr. Bryce remarks, "It is a weak point in the historical method as applied to the science or philosophy of law that it is more applicable to the law of any particular country than to the theory of law in general, for the details of legal history vary so much in different countries that immense knowledge and unusual architectonic power are needed to combine their general results for the purposes of a comprehensive theory."<sup>1</sup>

658. We have thus arrived at a classification of the legal sciences:

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<sup>1</sup> "Studies in History and Jurisprudence," II, 186.



659. The borderland between the sciences indicated cannot be drawn with logical precision. In the nature of things, there must be much overlapping. The relationship between the sciences is one of co-operation, not of conflict. Each must borrow from others conceptions which it does not itself establish. All alike serve the great practical purpose of giving new life and meaning to existing rule. Man is a dull creature in whose hands the rule is apt to become inert. So, aspiring to bring life and meaning to rule, aspiring to adapt rules to an ever-changing social and economic milieu, he now summons to his aid the evidences of the past, now turns to the study of a foreign system, or concentrates his scrutinizing



glance upon the sacred texts of his own—everywhere justified by the hope that he may succeed in seeing beneath externals to the innermost meaning of the law by which he lives. But whilst all the legal sciences in some degree contribute to this ultimate purpose, they do so with varying degrees of success. They have accordingly a varying value for the practically minded student. The science of which that student is most in need, appears to me to be Particular or National Jurisprudence. The historical and comparative investigations which have contributed to this science only concern him indirectly. The special purposes of the science, and the means by which those purposes may be served, are subjects to which I propose to devote the remainder of the present excursus.

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660. At the outset we must distinguish, more carefully than has been usually done, between the needs of two classes of students—those who have yet to begin their legal studies, and those who have already made considerable progress in them. A student of the former class demands a treatise on elementary law rather than on National Jurisprudence. He needs a general description of the land he is about to explore in order that he may obtain some general impressions to which his own experience is hereafter to give a meaning and content. He needs, in short, an elementary outline of his system, with just sufficient in the nature of detailed illustration to make that outline intelligible. Nor, if he be wise, will he despise a foreword as to ways and means of study. "The use of law books and the appreciation of legal authorities," says Sir F. Pollock, "can be fully learned only by assiduous practice; but here, again, it has long seemed to me that something can be done to lighten the first steps of the beginner."<sup>1</sup>

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661. National Jurisprudence affects more ambitious purposes than that of providing the student with a general

introduction to legal studies. The nature of those purposes <sup>Juris-</sup> may be distinguished as artistic or practical. The artistic <sup>prudence.</sup> purpose is to meet the demand, which must be felt more or less consciously by every student worthy of the name, to realize the unity of his subject and the harmony which pervades it. In the study of the law, as in all great study, there is implied on the part of the student some sense of beauty, some love of truth for its own sake, some will to discover under an infinite variety, the unity which gives distinction and charm to every work of art.

662. What practical purposes are served by a National <sup>Practical</sup> Jurisprudence? Obviously, a student who has once realized <sup>purposes.</sup> that the rules of law are portions of an ordered system will more easily remember, and more readily apply, those rules. It is a more important if less obvious fact, that such a realization implies an added insight into the *meaning* of rules. In realizing the nature of *law*, we acquire a new power of interpreting *laws*. In appreciating our subject-matter as a whole, we gain a knowledge which enables us to press down to greater depths the comprehension of the rules and principles which we have previously formulated.

663. The means for realizing the artistic and practical <sup>Means for</sup> purposes of National Jurisprudence are not always the same. <sup>their real-</sup> Juridic art is concerned with the form of law; it implies an <sup>ization.</sup> analysis of legal principle and a theory of legal classification. Practical Jurisprudence, on the other hand, concerned with meaning rather than form, implies in addition to such an analysis some account of what law stands for in the general scheme of things, and supremely a theory of the ends which law serves. "I must confess to a certain feeling," writes Lightfoot, "that law is meant to serve the interests of the people, and that no treatment of it can be called scientific which does not show how it contributes to this end. . . . As long as we take our distinctions solely from English law and

explain them merely by history, we do not enter upon science, for the distinctions and principles may be merely accidental, and the historical reasons may have no reference to utility. If, however, we were to show that these distinctions and principles have a real basis in the wants of the people, we should then treat the law scientifically, and we should work out the Particular Jurisprudence of the country."<sup>1</sup>

664. Two ways of regarding the ends which law serves have alike a sound justification in fact. The one we may call the economic, the other the ethical. According to the economic view, the purpose of law may be expressed as the discovery of the conditions under which man adapts himself to his environment in so far as those conditions are maintainable by the organized force of a political society; the predominant and determining factor in the development of law must be sought in man's constant endeavour to respond to the pressure of economic facts, to discover some way of realizing his will to live; laws, in a word, are what economic necessities have made them. According to the ethical view, the purpose of law is to realize man's idea of the just. Although what is just may be difficult for him to determine, yet to know the just, and to do it, is his mission. Whether justice be regarded as something divinely revealed to man; or as something absolute, immutable, superior to contingencies of fact, and determinable by some *a priori* process of reasoning; or again, as something whose meaning and nature are being revealed in the long course of social evolution and so to be determined by the analysis of human experience—in either of these cases we are confronted by the fact of an ideal of justice to which it is held to be the mission of law to conform. "Justice is," said Carlyle, "whether I can define it or not."

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<sup>1</sup> "The Nature of Positive Law," p. 11.

665. The legal doctrine of our time has been more ready to acknowledge the importance of the economic than of the ethical view of the ends which law serves. This is, however, a mere reaction against older doctrine which should be avoided. To think of man as solely impelled by economic or elementary social necessities, is suggestive of the view which holds him a mere creature of his environment. Man not only adapts himself to his environment, but he also adapts environment to himself. He seeks not merely to live, but to live in accord with some ideal of justice. The conditions in which he has to live are not alien influences affecting him as the storm affects a windmill; they are the material out of which he fashions his life in accordance with ideals which he has come to revere. As Vico said, with profound truth, interest and necessity are no more than the occasions which awake in man that consciousness of right which is the constitutive principle of social life.<sup>1</sup> I believe that evidence as to the truth and the importance of this view of law may be found in a study of the lives of great lawyers. Most of the lawyers who have profoundly influenced the course of legal interpretation in their generation, however limited in some respects their intellectual outlook may have been, have yet been distinguished by a deep reverence for Justice. It has been said of Papinian that if he was the prince of jurists it was because he knew better than any of his contemporaries how to subordinate law to morals. "He has no equal in the precision with which he states a case, eliminating all irrelevancies of fact, yet finding relevancies of humanity that would have escaped the vision of most"<sup>2</sup>

666. Whether, therefore, we dwell more on the economic or the ethical views of law, whether we regard it as primarily

Import-  
ance of  
ethical  
view of  
law.

Need for a  
compre-  
hensive  
theory.

<sup>1</sup> Flint, "Vico," p. 140

<sup>2</sup> Muirhead, "Roman Law," p. 324.

a result of the pressure of elementary social and economic necessities, or as primarily a realization of man's idea of the just, we need not ignore the indisputable element of truth in the other view. A true juristic theory will, in fact, combine them. This implies a wider interpretation of law than has been hitherto deemed necessary. It is, however, an interpretation towards which the best thought of our time is tending. "I look forward," writes Chief Justice Holmes, "to the time when the part played by history in the explanation of dogma shall be very small, and when, instead of ingenious research, we shall spend our energy on a study of the ends sought to be obtained, and the reason for desiring them. The present divorce between schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made." Further confirmation may be found in the practice of the law schools of France, Germany, Russia, Switzerland, Hungary, Greece, and Japan. "Les sciences politiques," said a Professor from Japan at a recent Congress, "sont l'apanago de la faculté de droit." "Les juristes," said Michel Soboleff at the same Congress, "doivent être bien au courant de cette science (Political Economy), parce que les normes juridiques touchent principalement les relations économiques variées, l'achat et la vente, le loyer, le fermage, la propriété, etc. Pour appliquer les normes du droit, il est nécessaire de savoir et de comprendre la nature des relations vitales qu'elles règlent."<sup>1</sup>

h a 667. It may be inferred from what has been said, that  
 ory the to see law steadily and see it whole is a somewhat toilsome  
 ck of business. Sociology, ethics, politics, legislation, and political  
 tional economy suggest a range of studies which is too wide to be  
 ispru- within the possibilities of a course of legal study. The law  
 208.

<sup>1</sup> "Le Premier Congrès de l'Enseignement des Sciences Sociales," pp. 23, 26, 85, 86, 93, 121, 128.

student will say, "All this is too wonderful for me; I cannot attain unto it." Probably he will be right. Here, as elsewhere, he may find it necessary to content himself with a compromise. National Jurisprudence should endeavour to aid him in achieving this compromise. Each of the sciences to which I have referred has its own special view of law. A National Jurisprudence cannot hope to rival those sciences within their own special sphere. Yet by their aid it may succeed in presenting such a view of law and of the fundamental principles and conceptions of law as will enable the student to realize in his subject a new life and meaning, to get nearer that spirit which saves from the despotism of the letter.

668. I have stated at some length the practical purposes which might be served by a National Jurisprudence. The excuse for this statement might be found, if excuse were needed, in a prevalent scepticism which has been inherited from times when the avowedly scientific treatment of law disdained to serve the wants of practice. "All who have written of laws," says Bacon, "have treated that subject as philosophers or as lawyers. And the philosophers propound many things beautiful in speech but remote from use." Even in times more modern, when the scientific treatment of law has ceased to be a sort of Jurisprudence in the air, it has yet recognized its practical function very inadequately. The logic of law has dominated the spirit. Hence an excessive attention to such matters as the theory of legal classification—a subject of more interest to the writers of text-books than the students of law. We shall only conquer this despotism of the logic, we shall only learn how the practical purposes of National Jurisprudence can be effected, when we have realized the full significance of the fact that law is the resultant of innumerable social and economic forces, and cannot be adequately studied in

isolation from those forces. Those forces are present at the making of law; they are no less obviously present in its application. "Before a law attains its ends through the processes of administration and interpretation," very justly observed Sheldon Amos, "it is directly qualified by every strong wave, and by all the multitudinous weaker waves, of thought and feeling by which, for the time, the community is swayed."<sup>1</sup>

futed : 689. Let any student, who is disposed to regard all this as  
 ) Appeal vain theory, reflect for a moment upon some of the more  
 ) experi- important economic facts of the nineteenth century—the  
 ) ce. multitudinous inventions of modern science, the rapid development of commerce, trade and industry, the vast aggregations of modern capital, the power of the modern trade union. Let him further reflect upon the great humanitarian and democratic movement of the nineteenth century, which has transformed theology, has emancipated woman, has changed history from a record of dynasties into a story of peoples, and has taught art and literature to see and express something of the sacredness of the mean and lowly. Let any student, who reflects upon those things, ask himself whether it is conceivable that they have not a profound significance for the lawyer as well as for the legislator. The Law Reports afford abundant evidence on this matter. Law is proverbially conservative; yet it would need to be a thousand times more conservative than it is, if new economic facts and new social ideals did not re-shape it, modifying the letter or breathing into that letter a new spirit. The lawyer who wishes to forecast the judicial interpretation of any problem that is not already covered by precise rule will be the more capable of doing so if he has learned to regard law, not as something existing in complete detachment

from life, or as a mere *beau chef d'œuvre de logique*, but rather as something which is being constantly re-shaped by the facts of life, the thought and aspiration of men.

670. Scepticism on this point has sometimes entrenched <sup>(b) The</sup> itself behind the authority of the great lawyers of Imperial <sup>lawyers of</sup> Rome. "Consider the lilies how they grow," it is said in <sup>Imperial</sup> effect; "they toil not, neither do they spin. Yet Solomon in all his glory was not arrayed as one of these." Roman lawyers certainly managed very well without the help of any special science of the law. Yet I believe that a consideration of the reasons for the high reputation which the Roman lawyers have so justly gained, will tend to confirm, rather than weaken, our confidence in the modern claim for a science of law. In the first place, the Romans were men of great intellectual power, who were capable of doing without many aids which lesser men would be unwise to refuse. In the second place, they were indefatigable students. They had a profound knowledge of their legal system in all its inter-relation of principle and detail. The student of the Digest is astounded to discover how rarely the Roman jurists erred in their application of legal rules to the most difficult and detailed groups of facts. Their solutions harmonize with one another, and with the system as a whole. Their perception of the right rule to be applied seems so unerring that we are tempted to think of them as divinely inspired, or as gifted with some infallible and inexplicable instinct. In reality, they decided well because they had studied much. In the third place, they were distinguished by an exceptional regard for Justice. Such a regard may be assumed from the mere position of the Roman as an Imperial Race. A nation may conquer other nations without having more than the merely military virtues; it cannot hold them in subjection for long centuries without being itself distinguished for an exceptionally keen sense of fair play—a sense which both the



Roman and the Anglo-Saxon have possessed in a rare degree. Finally, though the Romans had no formulated recognition of the purposes of a National Jurisprudence as we understand the term, there are abundant evidences that they realized those purposes in indirect ways. Most of them were men of varied culture and philosophical training. No jurists as a class have ever realized more fully the imperative call of law to serve practical ends. "The Roman jurists," writes Mr. Bryce, "reason and write as men who have been thoroughly trained, who have been imbued with a large and liberal view of law, who have philosophy and analysis and the sense of historical development equally at their command. They are endowed, in fact, with the qualities which, as we have been led to think, a course of the Theory or Science of Law ought to impart. How, then, did they acquire these qualities? First, by the study of philosophy. Though our data scarcely justify a general statement, it seems probable that many of the jurists, especially such as grow up at Rome, received instruction in Greek philosophy. It has been suggested that not a few professed the doctrines of the Porch. Anyhow, the conception of Nature as a force or body of tendencies prompting and guiding the progress of law was familiar to them, and appears to have influenced their ideas. . . . The Romans, though saying little about the broad aspects or so-called Philosophy of Law, do, in fact, pursue it in a philosophic spirit, and to this the excellence of their system is largely due."<sup>1</sup>

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<sup>1</sup> "Studies in History and Jurisprudence," II, 200-7

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